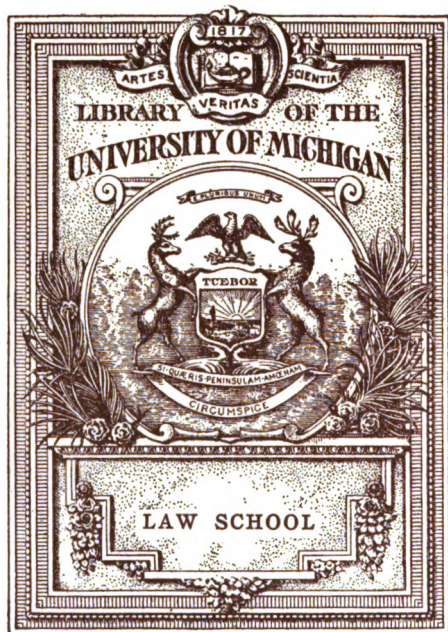

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CASES

ARGUED AND DECIDED

IN

THE SUPREME COURT

OF

THE STATE OF TEXAS,

DURING

A PART OF THE TYLER TERM, 1876, AND A PART OF THE
GALVESTON TERM, 1877, EMBRACING MOST OF THE
CASES DECIDED AT BOTH TERMS.

REPORTED BY

TERRELL & WALKER.

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SUPREME COURT OF TEXAS.

HON. ORAN M. ROBERTS, CHIEF JUSTICE.

HON. GEORGE F. MOORE, }
HON. ROBERT S. GOULD, } ASSOCIATE JUSTICES.

HON. H. H. BOONE, ATTORNEY GENERAL.

WM. P. DE NORMANDIE, Clerk Austin Term.

R. P. ROBERTS, Clerk Tyler Term.

N. J. MOORE, Clerk Galveston Term.

ALEX. W. TERRELL, }
ALEX. S. WALKER, } Reporters.

(iii)

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SUPREME COURT OF TEXAS.

TYLER TERM, 1876.

WALDROFF & LEARY V. S. T. SCOTT.

1. **MECHANICS' LIEN—JUDGMENT IN REM.**—The mechanics' lien law of 1871, (Paschal's Dig., art. 7112,) while it authorizes a sub-contractor, or employee of the contractor, to fix a lien upon the house and lot or land which may be enforced by a judgment against the owner, after a compliance with the provisions of the statute, still it does not authorize him to recover a general judgment *in personam* against the owner for the debt claimed, to be collected out of his property generally, as other judgments rendered against him for his own debts.
2. **MECHANICS' LIEN—PRACTICE.**—There being no special mode of proceeding pointed out for enforcing in the courts a mechanics' lien under the act of 1871, the remedy pursued should be in accordance with the general principles and practice relating to the enforcement of liens.
3. **MECHANICS' LIEN—PARTIES—PRACTICE.**—It would seem to be the proper practice for the sub-contractor, on bringing a suit against the owner to enforce his lien, to make his employer a party, so as to have adjudicated the amount of his debt at the same time, unless it had been previously adjudicated, and also to make others who had liens (if there be any) parties, to settle their validity and adjust their priority.
4. **MECHANICS' LIEN.**—When the account and specifications of a contract, filed and recorded by the workman, who seeks to enforce a mechanics' lien, fail to place him in the attitude of a sub-contractor, no lien can be enforced in his favor as a sub-contractor.

APPEAL from Harrison. Tried below before the Hon. M. D. Ector.

Orville Waldroff and James Leary brought suit against S. T. Scott for \$159, with interest, alleging, that in October, 1873, they erected the basement story of a dwelling-house for

Statement of the case.

defendant in Harrison county, on which they used material and bestowed labor, which they specified. They alleged that on the 15th day of November, 1873, they filed with the clerk of the District Court of Harrison county their account against the defendant for said sum of money, with what is designated as a contract, which was made an exhibit. The exhibit filed consists of an account for \$159, made out against Waldroff & Leary, and the affidavit made by O. Waldroff and J. Leary, in which they state that the account is just and correct; that they first contracted to do the work with one Willis Green, and that after working a few days they became dissatisfied and refused to proceed, unless S. T. Scott would become responsible, which he then consented to do. The affidavit concludes with a claim for a lien on the property, as being given by act of November 17, 1871.

The answer of Scott denied the contract, and alleged that if plaintiffs were employed at all, the same was done by one Willis Green, and without Scott's knowledge; it further alleged that when plaintiffs were about engaging in the work they were expressly told that they must look to Green alone for their pay, which they, it is alleged, agreed to do.

It was agreed that the account and affidavit containing the alleged contract were properly recorded, and a copy served on the defendant below, and that the work was done as alleged.

The testimony offered by the parties plaintiff, was contradicted in almost every particular by the witnesses for Scott. The plaintiff, Waldroff, and Green swore that Scott told the plaintiffs to go on with the work and he would see them paid. Scott was his father-in-law. William M. Jones stated that no such conversation occurred at the time stated, but that, on the contrary, Waldroff & Leary were told that they must look to Green for their pay, which they agreed to during the progress of the work, and were shown an account for \$105 due from Green to Jones, which they were informed must be paid by Green in that work.

Opinion of the court.

The following charge was asked by defendant's counsel and refused by the court, the refusing of which was assigned for error, viz :

"The plaintiffs ask the court to charge the jury that, if they find that said plaintiff's work upon the house of defendant, under a contract with Willis Green, who had made a contract with defendant to do said work, and that defendant knew that said plaintiff was doing said work and received the same after it was done, and that within six months thereafter plaintiff caused their contract to be reduced to writing and recorded in the clerk's office of Harrison county, Texas, and a copy thereof to be served on defendant, they will find for the plaintiffs the amount said work has been proven to be worth, less the sum due by Willis Green to William M. Jones at the date of the contract between Willis Green and defendant."

Verdict and judgment for defendant, from which Waldroff & Leary appealed.

George L. Hill, for appellants.

H. McKay and *W. H. Pope*, for appellee.

ROBERTS, CHIEF JUSTICE.—It is contended by counsel for the appellants that the court erred in refusing to give the charge asked for by the appellants, the object and purport of which was to secure them a mechanics' lien, under the law of 1871, whether or not they proved to the satisfaction of the jury that Scott had become bound by contract with them to pay what they were entitled to, under their contract with the contractor Green, for their labor done on Scott's house.

The act provides, amongst other things, that a mechanic who may labor in the erection of a house improvement, shall have a lien upon the house and upon the lot or land upon which it is situated. To secure the lien he must file and cause to be recorded his contract in the district clerk's office,

Opinion of the court.

in the county where the lot or land is situated, within six months from the time when the debt becomes due.

If the contract is verbal, affidavit must be made to duplicate copies, with a bill of particulars, one of which shall be served on the party owing the debt. The said contract or account must be accompanied with a description of the lot or land upon which the lien is claimed. (2 Paschal's Dig., art. 7112.)

Under this act a mechanic who performs labor on a house, though he be only a sub-contractor or employe of the contractor, may secure a lien upon the house and lot, or land to the extent of fifty acres if it be in the country, by complying with the terms of the law, although there has been no contract about the labor between him and the owner of the lot or land. (Phillips on Mechanics' Lien, sec. 52.) The law contemplates that he shall file and have recorded the contract that he has made with his employer, and serve the owner of the house with a copy of that, made out as prescribed by the statute.

This authorizes him to fix a lien upon the house and lot, or land, which may be enforced by a judgment against the owner, subjecting that property to the payment of the debt, but does not authorize him to recover a general judgment *in personam* against the owner for the debt claimed, to be collected out of his property generally, as other judgments rendered against him for his own debts. (Phillips on M. Liens, secs. 10 and 305; 1 E. D. Smith, (N. Y.,) 661.)

This act of 1871 does not prescribe any mode of adjusting the amount of the debt as between the mechanic and his employer, the contractor, for which the lien upon the house and lot or land of the owner is to be enforced, such as is provided, before suit, by the act of 1844, where the mechanic seeks to stop the amount of his debt for his labor in the hands of, and to recover it from, the owner of the house upon which the labor is performed. (Paschal's Dig., arts. 4595-4598.)

There is no special mode of proceeding pointed out for

Opinion of the court.

enforcing in the courts this mechanics' lien on the house and lot or land of the owner under the law of 1871; and therefore the remedy pursued should be in accordance with the general principles and practice relating to the enforcement of liens in our courts. (Phillips on M. L., sec. 315.)

Under this view, it would seem to be appropriate for the sub-contractor, in bringing a suit against the owner to enforce his lien, to make his employer a party, so as to adjudicate the amount of his debt at the same time, unless it had been previously adjudicated. (Phillips on M. L., sec. 312.) And it might also be necessary to make others parties, who had liens, in order to adjust their priority, as well as to settle their validity. (*Preston v. Breedlove*, 45 Tex., 47; *Byler v. Johnson*, 45 Tex., 509.)

- These suggestions are made on account of the want of any established practice in our courts in the enforcement of the right of lien given in this recent statute of 1871.

The account and memorandum of contract made out, filed, and caused to be recorded by the plaintiffs, was not for a debt due them from Green, the contractor, but from the defendant Scott, the owner of the house and land.

The plaintiffs declared against Scott, the owner, on a contract made by him with them, and on a promise to become directly responsible to them for the price of their labor on the house, and sought to recover a personal judgment against him for their debt, as well to obtain a judgment and decree of the court, establishing their mechanics' lien upon his house and land to secure his alleged debt due to them.

The plaintiffs, neither in the mode of making out their account and specification of contract, nor in the allegations and prayer of their petition, placed themselves in the attitude of sub-contractors or employes of the contractor.

The court therefore correctly refused to give the charge asked for by their counsel, which would have permitted a recovery, simply on the ground that they did the work as sub-contractors or employes of Green.

Syllabus.

The evidence, on the trial, might have required such a charge, and it would have been proper to have given it, if the case made by the plaintiffs in their pleadings had warranted it. It was not practicable for the pleadings to have been shaped so as to admit of such a charge, because the contract, filed and recorded to fix the lien, put plaintiffs in the position of contractors, and not sub-contractors or employes of a contractor.

The court, in the charge which was given to the jury, made the plaintiffs' recovery depend upon their establishing the account and contract with the defendant, that being the contract, filed and recorded to fix a lien, of which defendant had been notified, and which was set out and declared on in the petition.

The evidence in regard to the contract sued on was conflicting, and both sides being well sustained by the testimony of witnesses, the jury had to determine the matter in issue between the parties. Their verdict cannot be disturbed by this court under the well-settled rule on that subject by which it has been governed.

Neither in the action of the court, nor that of the jury, do we find any good ground of reversal, and therefore the judgment is affirmed.

AFFIRMED.

MARY HENDRIX v. PEYTON HENDRIX, Ex'or, &c.

1. **HOMESTEAD.**—If, at the time of the husband's decease, there was a homestead, the widow cannot abandon it and select another out of the estate in lieu thereof.
2. **APPROVED,** *Rogers v. Ragland*, 42 Tex., 422.
3. **ESTATES OF DECEDENTS—PRACTICE—JUDGMENTS.**—No judgment can be rendered in favor of one claiming against an executor, after exceptions are sustained to his answer, on an assumed confession of the facts alleged in the petition. The facts on which a claim of right against the estate is based must be sustained by evidence.

Statement of the case.

APPEAL from Wood. Tried below before the Hon. Z. Norton.

Mary Hendrix brought suit in the District Court of Wood county against P. J. Hendrix, executor on the estate of her husband, Larkin Hendrix, deceased. She alleged the insolvency of the estate, and asked an allowance of two hundred dollars for her support for one year, for which she alleged that no provision had been made in the will; she further alleged that soon after her marriage with the deceased, he lived with her in his dwelling-house situate on a 332½-acre tract, part of the Duncan headright, near the town of Quitman, and that she had never relinquished her homestead right to that place; that her husband had no household and kitchen furniture, and she claimed two hundred dollars in lieu of that; that she had neither horses, cows, nor hogs, and claimed the value of so much of each description of property as was exempt from forced sale. She alleged in an amended petition that her husband, during his last sickness, stayed at the Duncan headright place, and died there; that another place claimed by him, known as the Barnhill place, where he had lived previous to his last sickness, was in litigation; that he had never acquired a good title thereto, and she formally announced in her pleadings her election to take the Duncan place as her homestead. She prayed that in the event the court should decide that appellee and his sister were entitled as the children and heirs-at-law of Eliza Hendrix, deceased, (the former wife of her deceased husband, Larkin Hendrix,) to one half of the Duncan place, then that the other half of the tract be set aside to her as homestead, and one thousand dollars in money, to make up the deficiency in the number of acres allowed as a rural homestead under the law.

Appellant, P. J. Hendrix, in his answer, denied that the Duncan place was the homestead of his testator at his decease, but alleged the homestead was then on a tract known as the Barnhill survey. He set up title in himself and in his sister, by virtue of inheritance through their deceased mother,

Opinion of the court.

(a former wife of the testator,) to one half of the Duncan tract of land, and to the other half by virtue of a gift from his father. Appellant alleged that the appellee was then living on the Barnhill place, as a homestead, and that he and his sister had agreed that appellant might occupy the Barnhill place homestead during her natural life; and that, in consideration thereof, appellee relinquished to them whatever claim she had in the Duncan place, and the articles and substituted allowance which she had asked to be set aside to her.

A general demurrer was sustained to the answer of appellee, to which an exception was taken and notice of appeal given.

There is no statement of facts, but an agreement, signed by counsel, to the effect that no evidence was introduced; but the court entered the order complained of, on sustaining exceptions to appellant's answer, opposing counsel being present in court and objecting thereto.

The judgment recites that the defendant, failing to answer after the demurrer to his original answer was sustained, "it was considered by the court that the facts set forth in plaintiff's petition and amended petition be taken as true." It set aside to the plaintiff below the amounts claimed by her in lieu of the property exempted by the statute and decreed to her a one half interest in the homestead tract claimed by her, and attempted to accomplish other things not necessary to mention.

The action of the court below in sustaining the demurrer and rendering the judgment was assigned for error.

Jones & Henry, for appellant.

GOULD, ASSOCIATE JUSTICE.—The later decisions of this court have held that if, at the time of the husband's decease, there was a homestead, the widow cannot abandon that homestead and select another out of the estate in lieu thereof. (*Rogers v. Ragland*, 42 Tex., 422.)

Opinion of the court.

The action of the court below on the subject of the homestead was evidently based on the erroneous assumption that the widow had this right of selection, and not upon any investigation of the fact in regard to the existence or non-existence of a different homestead from that selected.

So, also, the other orders appealed from, making an allowance for a year's support and requiring the executor to deliver certain exempted articles, or, in lieu thereof, the specified value of each article, were evidently based on the erroneous assumption that the averments of the petition were to be taken as true, for want of an answer, and from the indefinite manner in which the orders are formed, it would seem that no inquiry was instituted to ascertain whether or not these exempted articles, were to be found in kind amongst the property left by the deceased. The order of the court that the averments of the petition and amended petition be taken as true for want of an answer, and its action in basing its orders on this assumed confession of the facts therein stated, are not in accordance with the practice prevailing in proceedings in matters pertaining to estates, and are not supported by anything in the statute then in force regulating such proceedings. This error infects all of the orders appealed from, and gives to most of them an indefinite and alternative form, which would scarcely have been adopted if they had been based, as they should have been, on the actual condition of applicant and of the property left by the deceased.

It is deemed proper to dispose of this case without intimating any opinion as to the power of the District Court, under the act of August 15, 1870, prescribing the mode of proceeding in matters of probate, to make an allowance in lieu of exempted articles not existing in kind. For aught that appears in the record, the various exempted articles may be proved to exist in kind amongst the property left by decedent, and it may be that this and other questions suggested in the brief of appellant's counsel, may not arise again.

Argument for the appellee.

For the errors which have been specified, the various orders appealed from are reversed and the cause remanded with directions to the court below, being the County Court, to hear and dispose of the petition anew.

REVERSED AND REMANDED.

ANDERSON BOGGS ET AL. v. THE STATE.

1. PRACTICE—EVIDENCE—PRINCIPAL AND SURETY.—In a suit by the State against an officer on his official bond, the cause of action survives against the securities on the death of their principal, and upon the suggestion of the principal's death the cause may proceed against the securities without alleging or proving the insolvency of the principal.
2. PUBLIC OFFICER—TAX COLLECTOR'S RESPONSIBILITY.—A tax collector does not occupy toward the State the relation of a mere bailee for hire, who is responsible only for such care of the public money as a prudent man would take of his own; he is bound to account for and pay over the public money that he collects, less his commission, or his securities must pay it for him.
3. AUDITOR'S REPORT—EVIDENCE—TRIAL BY JURY.—A party has a right to specially object to any item allowed by, or disallowed, or to any conclusion arrived at, by an auditor, as exhibited in his report, and have the verdict of a jury thereon in response to evidence adduced on the trial of the case. In the absence of such objections it is not error for the court to charge, that the report of the auditor is conclusive, nor does such practice contravene the right of the party to a trial by jury.

APPEAL from Rusk. Tried below before the Hon. M. H. Bonner.

James H. Jones & Charles A. Smith, for appellants, cited, in support of their position that Boggs was only a bailee, Story on Bailments, sec. 442; Jones on Bail., 97, 98, 99; Platt v. Hibbard, 7 Cowen, 497; Story on Bailments, secs. 444, 445; Brown v. Denison, 2 Wend., 593.

W. H. Morris, for appellee, cited United States v. Prescott,

Opinion of the court.

3 How., 578; 11 How., 154; 4 Wallace, 182; 1 Denio, 233; United States Dig., 311.

ROBERTS, CHIEF JUSTICE.—This suit was brought by the State against Anderson Boggs, and a number of other persons as his sureties, on a tax collector's bond.

After the suit was brought, and before the trial, the death of Boggs, the principal, was suggested, and, by an amendment of the petition, it was alleged that he was dead, and that his estate was insolvent. Plaintiff discontinued the suit as to him. On that account the defendants, the sureties, moved to dismiss the action as to them, which motion was overruled. On the trial they asked the court to charge the jury that it was necessary for plaintiff to prove the insolvency of Boggs as alleged, which the court refused to do.

These rulings of the court, having been excepted to and assigned as error, may be considered together, as the view we take of the first will also dispose of the second—there having been no special issue raised upon either the death or the insolvency, to take this out of the ordinary rule of practice.

The defendants relied on the statute, which provides that "the principal and the indorser or surety upon any instrument in writing may be joined in the same suit; but no judgment in any such suit shall be rendered against the indorser or surety unless judgment is at the same time rendered against the principal; except when the plaintiff discontinues against the principal because he resides beyond the limits of the State, or because he is insolvent, in which case he may discontinue and take judgment." (Paschal's Dig., art. 1449, also art. 1426.)

This article is contained in the District Court act of 1846, and in the same act we find it provided that in all suits where there are two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive, the death may be suggested, and the action proceed for or against the survivors. (Paschal's Dig., art. 695.)

Opinion of the court.

In this case the cause of action certainly survived against the sureties of Boggs, upon his death, and therefore, under the section of the law last cited, it was only necessary to suggest his death, and proceed with the case against his sureties. (*Petty v. Cleveland*, 2 Tex., 406.)

As early as 1836, and ever since, there has been a provision exempting a surety from suit before suit against the principal, unless the principal was beyond the jurisdiction of the court. And under such provision this court has decided, that the death of the principal placed him beyond the jurisdiction of the court, and that if he died pending a suit against him and the surety, upon his death, being suggested of record, the plaintiff might proceed with his suit against the surety. (*Ennis & Reynolds, v. Crump*, 6 Tex., 85, and cases cited; *Aldridge v. Mardoff*, 32 Tex., 204.)

The defendants filed a special answer, averring that Boggs, as tax collector, having collected the taxes, and being about to start to Austin with the money, had \$1,300 of it stolen from him, without his fault, (stating the circumstances of its loss.) The plaintiff filed exceptions to this answer, which were sustained, which is assigned as error.

It is contended by the counsel for the appellants that Boggs, being an officer, occupied towards the State the position of a bailee for hire, in the business of collecting, preserving, and accounting for the taxes of Rusk county, and that as he took care of the money in his hands, as a prudent man would ordinarily have done, in reference to his own property, neither he nor his sureties were responsible for its loss.

We do not understand such to be the legal position and responsibility of the public officer whose duty it is to collect and account for the money of the State as a tax collector, nor is it in accordance with the terms of his bond, signed by him and his sureties, as prescribed by law.

He is bound to account for and pay over the amount of money which he collects less his commissions, or his sureties

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must do it for him. (Paschal's Dig., art. 7481; *Boyden v. United States*, 13 Wall., 17.)

The plaintiff set out in the petition the official bond as tax collector, and alleged breaches of the conditions in the non-collection and in the collection and non-payment of a certain amount of taxes, as shown by a certified statement of account from the comptroller of the State of Texas. The defendants answered that Boggs had been turned out of office by General Reynolds; that he had been ordered to turn over the tax rolls to his successor before he had completed the collection upon them, and that he was entitled to credits on that account as well as for commissions due him, and for taxes of insolvent persons.

Upon motion of defendants, the court appointed an auditor to make a statement of the account between the State and Boggs with specific directions as to the items of account to be investigated by him, with power to take evidence and determine and report upon the same.

J. N. Still was appointed auditor, and made his report in accordance with his instructions, showing a balance against Boggs in an itemized statement of accounts, to which the defendants filed the following exceptions, to wit:

"And now come all the sureties, defendants in the above-entitled cause, and except to the sufficiency of the auditor's report filed therein, and say that it is insufficient in law.

"And for special exceptions they say that these sureties are not bound by said report.

"And they say that, to hold them bound by said report, they would be thereby deprived of a trial by jury."

The court overruled these exceptions, which is assigned as error.

This is a motion to set aside the report of the auditor, in contradistinction to objections taken to any part or item of it.

No reason is given, or fact pointed out in the motion from which it can be perceived why the sureties are not bound by a report of the auditor, which they, as defendants, sought to

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have made for their own benefit. Nor would this ground be any stronger if the auditor had been appointed at the instance of the plaintiff. (O. & W. Dig., art. 565.)

As to the second exception, that the defendants are thereby deprived of a trial by jury, that is equally untenable. According to the rules laid down by this court in the leading case upon the subject in the construction of our statute authorizing the appointment of an auditor, the defendant had a right to specially object (upon reasonable notice thereof to the opposite party) to any item allowed or disallowed, or to any conclusion arrived at by the auditor as exhibited in his report, and take the verdict of the jury thereon in response to evidence adduced by either or both parties on the trial of the cause. (*Whitehead v. Perie*, 15 Tex., 7.) Not having made any such objections, the defendants have no right to complain of the action of the court in that regard.

Nor in the absence of any such objections was it error in the court, to charge that the report of the auditor was conclusive evidence as to the amount found against Boggs; because that which is only presumptive and admissible evidence of a fact may be conclusive when not opposed by any evidence whatever. And in this case there was none.

There are some other questions raised, which it would hardly be necessary or proper to review. As, for instance, the allowance of interest from the day of the suit, under a prayer for a large amount of damages, and the "discharge" of several of the defendants by the court under their pleas of bankruptcy, the sufficiency of which was submitted to the court by consent of parties.

There being no error found in the judgment it is affirmed.

AFFIRMED.

Statement of the case.

WILLIAM M. HARRISON v. JAMES M. VINES, SHERIFF, &c.

1. **TAXATION BY STATE OF STOCK IN UNITED STATES BANKS.**—It is well settled that shares of banking associations authorized by the act of Congress of June 3, 1864, "To provide a national currency," in the hands of the shareholders, are liable to taxation by the States, within the limitations set forth in said act, although the capital of such bank is invested in national securities declared by said act as "exempt from taxation by or under State authority."
2. **SAME.**—The act of June 3, 1873, (13 Leg., 204, 205,) requires the assessment for taxation of "any shares or stock in any banking company or corporation." The word "share" and "stock" are used as synonymous, and each corporator is required to give in for taxation the part or portion of the capital or capital stock of the corporation, or association, he owns.
3. **SAME.**—It is not necessary that it be embodied in the State law imposing such a tax, that it is not greater than that levied upon capital in the hands of individual citizens, or upon the shares of banks organized by the State laws. It is sufficient that such law in fact does not violate those provisions of the national currency act.
4. **INJUNCTION—ASSESSMENT.**—It is not a sufficient ground for an injunction restraining the collection of a tax upon an assessment actually made, that it has not been correctly described on the assessment rolls, prepared from the assessments actually made. *Prima facie* the tax is due upon the assessment, and equity will not aid one who is himself in default.
5. **STATUTE CONSTRUED.**—Act of June 12, 1873, 13 Leg., 204, 205.

APPEAL from Marion. Tried below before the Hon. James M. Rogers.

February 19, 1875, Harrison filed in the District Court of Marion county his petition for an injunction against Vines, the sheriff, to prevent the sale of certain personal property (an iron safe and its contents) to satisfy the tax due on five hundred shares of stock in the National Bank of Jefferson. A temporary injunction was granted by the judge.

The defendant answered, and moved to dissolve the injunction at the May Term ensuing of said court.

The allegations relied on for the injunction will appear from the discussion of the judge upon them in the opinion.

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save that the justice of the peace had assessed a like amount in value against plaintiff, and that without notice the sheriff had applied to the County Court and obtained from it an order correcting the assessment, so as to appear "five hundred shares in the National Bank at Jefferson, and valued in the aggregate at fifty thousand dollars."

The injunction was dissolved and the bill dismissed, from which the plaintiff appealed.

Epperson & Maxey and *Culberson & Crawford*, for appellant.—The national banks organized under the National Bank act, are agencies of the General Government, and are not subject to taxation by the States, unless the authority to levy taxes upon the banks is granted by the act of Congress. (*City of Utica v. Churchill*, 43 Barb., 550; same case, 33 New York, 161; 44 Barb., 148.)

National banks are responsible only to the National Government, and are entirely independent of State legislation. (*City of Pittsburg v. First National Bank of Pittsburg*, 55 Penn. State, 45.)

The National Bank act provides "that nothing in this act shall be construed to prevent all of the shares in any of the said association held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; and provided further that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located."

In defining the subjects of taxation, no mention is made of shares in State banks. (2 Paschal's Dig., art. 7553; Laws of

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13th Legislature, 204, 205.) This last-cited act mentions, as one of the subjects of taxation, "shares or stock in any banking company or corporation, or fire or life insurance company," but does not provide that the tax upon shares in State banks, and in fact does not make the shares themselves the subject of taxation, but uses the term "shares or stock." "The tax must be levied expressly upon the shares, and the act must contain the proviso that the tax upon shares in national banks shall not exceed the tax upon shares in State banks." (*Van Allen v. Assessors*, 3 Wall., 573.)

This act of the thirteenth Legislature leaves it uncertain whether the tax is to be assessed against the shares in the hands of the individual owners of the same or whether the tax must be assessed against the corporation as a whole and upon the capital stock.

"Statutes imposing burdens upon the citizen must be strictly construed, and the subjects of taxation and the amount of the tax must clearly appear. Any charge upon the subject must be imposed by clear and unambiguous language. Where any ambiguity is found, the construction must be in favor of the citizen." (*Blackw. on Tax Tit.*, 165; *Dwarris on Stats.*, 749; 10 *Wend.*, 186; 9 *Pick.*, 414; 8 *Ga.*, 30.)

The stock of the bank belongs to the corporation or association as a whole.

"The individual members of the corporation are interested, in one sense, in the property of the corporation, as they may derive individual benefit from its increase, or loss from its decrease; but in no legal sense are the individual members the owners." (3 Wall., 584; 9 *Adolph. & Ellis*, 806.)

If, under the State law, a tax is imposed upon the capital stock of the State banks, but none upon the shares, no tax can be levied upon the shares of national banks. (3 Wall., 573; 4 Wall., 244.)

Shares of stock in national banks are exempt from taxation in Illinois because the shares, as such, of the State banks

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are not taxed. (*People v. McCall*, 43 Ill., 286; 44 Barb., 148.)

The construction of the law has been the same in Iowa; and the shares of national banks are not taxable, though there are no State banks in existence in that State. (*Hubbard v. Board of Supervisors*, 23 Iowa, 130.)

In Kentucky the shares in national banks are taxed fifty cents on each share of \$100. (*Commonwealth v. National Bank of Louisville*, 4 Bush., Ky., 98.)

“Even if the tax upon the capital of a State bank is an exact equivalent to the tax upon the shares of a national bank, yet it is a different thing, being against the corporation, and will not justify a tax on the shares of the national bank. There are two cases—one in Ohio and one in Wisconsin—opposed to this view; but it is believed that it is sustained by the great current of authorities.” (*Bankers’ Magazine*, 1873.)

Upon an inspection of the answer of the appellee, the court will see that he admits that no assessment was ever made upon the shares of the national bank in the hands of the individual owner; but the assessment was for money on hand or at interest. So far as the shares are concerned, this assessment was absolutely null. The statutes of the State nowhere authorize the County Court to correct the rolls after they are placed in the hands of the sheriff, or at any other time.

Appellee admits that no valid assessment was made by the justice of the peace, and that he acted alone under the order of the County Court. “The appellant was not in default until the assessment was properly made and the tax demanded.” (*Clegg v. State*, 42 Tex., 605.) If the shares were not assessed, it was the duty of the justice of the peace for the precinct to make a supplemental assessment. (*Laws*, 1873, 148.)

One of two things is certain: either the County Court acted without legal authority, and their action is void; or, if the law authorized such a proceeding, Harrison had no notice

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of the same, and is not affected by it. He was no party to it in any sense.

The record shows that the petition of the sheriff, Vines, was filed December 14, 1874; that the County Court held a special session on that day, and acted upon the matter.

By this action of the County Court appellant has been denied the right to affix the value of his taxable property. The shares may be worth \$100 each, or they may be worth much less. The tax payer has the right under the law; "act of May 31, 1873," gives it to him; and it is only when the value is not sworn to, or when the assessing officer is satisfied that the value sworn to is too low, that the officer can affix the value. (Act 13th Leg., 127.)

We respectfully submit that the record shows that no assessment was ever made as required by law. The appellant was not in default, and the levy was unauthorized by law.

A. J. Peeler, Assistant Attorney General, for appellee.—Shares of stock in national banks are liable to taxation by the State. (Van Allen v. Assessors, 3 Wall., 573; National Bank v. Commonwealth, 9 Wall., 353.)

The State has taxed them. (Act of June 3, 1873, sec. 8, Paschal's Dig., art. 7713, top of p. 1616g.) Not only are "shares or stock in any banking company or corporation" particularly mentioned, but the tax laws in force repeatedly declare that all personal property, save that which is specially exempted, are liable to taxation.

The petition admits that the appellant is the owner of 500 shares of stock in the National Bank of Jefferson, in Marion county, in this State, upon which he has not paid the tax for 1874.

Is there anything in this case authorizing the interposition, by injunction, of a court of equity, to prevent the sale of personal property to satisfy this tax? This is the only question to be considered. There is not, because—

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1. There is no allegation of irreparable injury, &c. (High on Injunc., secs. 354, 362; *Ritter v. Patch*, 12 Cal., 298.)

2. The appellant does not come into court with clean hands. (*Id.*, sec. 363.) It was the duty of the appellant to have rendered his property for taxation. (*Paschal's Dig.*, arts. 7713, 7724.) He has refused to discharge this duty, required of every good citizen, and should not now be heard in a court of equity to complain of irregularities, not affecting the justness of the claim of the State against him, which a discharge of duty on his part would have avoided. (High on Injunc., sec. 356.)

3. The appellant does not show that any error has been committed to his prejudice or injury. (*Cowell v. Doub*, 12 Cal., 273.)

4. The error chiefly relied upon, viz: the illegality of the assessment, is without foundation. The assessment, if irregular in the first instance, was corrected before the attempted sale, conceding, as held in *Clegg v. State*, 42 Tex., 605, that an assessment is necessary to constitute a valid tax, there was a sufficient assessment in this case. No change was made as to the person or the amount; a correction was made only as to the description of the property. The object of the description "is to identify the property assessed with reasonable certainty," (*People v. Home Ins. Co.*, 29 Cal., 549,) a case somewhat similar to this.

After the correction the appellants refused to pay. If the Police Court may put lands on assessment rolls, (*Paschal's Dig.*, art. 1733,) have they not the power to correct an erroneous description which in no wise increases the tax?

Parties failing to render assessments are not to be favored. (*Paschal's Dig.*, art. 7766.)

The tax being due and unpaid it was the duty of the sheriff to sell, &c. (*Paschal's Dig.*, art. 7758, *et seq.*)

MOORE, ASSOCIATE JUSTICE.—It is now well settled by the Supreme Court of the United States, by whose construction

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of an act of Congress this court is unquestionably bound, that the shares of banking associations authorized by the act of June 3, 1864, "To provide a 'national currency,' &c., in the hands of the shareholders are liable to taxation by the States with the limitations and on the conditions set forth in the forty-first section of said act, although the entire capital of such bank is invested in national securities, which are declared by the statute authorizing them to be 'exempt from taxation by or under State authority.'" (*Van Allen v. The Assessors*, 3 Wall., 573; *People v. The Commissioners*, 4 Wall., 244; *National Bank v. Commonwealth* 9 Wall., 353.)

Appellant, however, insists that the tax here in question is unauthorized and illegal, because it is not levied upon the "shares," the personal property of each individual shareholder, but upon "stock," by which, as he maintains, a tax is sought to be imposed on the capital owned by the bank as "a corporate entity," and not by the shareholders, or if this is not the case, the law by which the tax is levied is void for uncertainty, whether it is levied upon "shares" or on stock. An inspection of the statutes, imposing the tax, shows that the objection is without force, and altogether hypercritical. The statute says it shall be the duty of any person, firm, corporation, or association owning "any shares or stock" in any banking company or corporation to render and return the same for the proper taxation. (Laws of 13 Legislature, 204, 205.) Now, it is very plain, that it is not the capital in whatever it may be invested owned by the bank "as a corporate entity," but the shares or stock belonging to each individual, firm, and corporation, who, together in their associate capacity, compose this "corporate entity" that is here referred to. The words "share" and "stock" are evidently used as of synonymous import, as is often done in common parlance. Each corporator is required to give in for taxation the part or portion of the capital or capital stock of the corporation or association which he owns. This individual interest may be denominated as either his "share" or

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his "stock." And whether it is spoken of as one or the other, evidently it is the interest represented, and evidenced by certificates for stock or shares into which the capital of the association is divided to which reference is had. (9 Wall., 60, 359.)

It is also objected that the statute imposing this tax does not conform to the requirements of the act of Congress authorizing an assessment of taxes on such shares by State authority, because it is not enacted or declared in the law imposing it, that the taxes levied thereby on the shares of the national banks, shall be of no greater rate than that assessed upon other recognized capital in the hands of individual citizens, and shall not exceed the rate imposed upon the shares of any banks organized under the authority of the State. The act of Congress authorizing the assessment, does not contemplate nor require that the restrictions upon the power given to the State to levy such tax, shall be embodied or set forth in the law making the assessment. It is the violation of the condition upon which the authority is given which invalidates the levy, and not the mere failure to accompany the levy with a declaration that the condition had not been and would not be violated by the State. But the law imposing the tax here in question clearly shows that shares in national banks are taxed at no greater rate than moneyed capital in the hands of individuals, or than the shares of banks organized under authority of the State.

It is also insisted, that the court erred in dissolving the injunction and dismissing the petition, because the tax which the sheriff was endeavoring to collect from appellant had not been legally assessed by the justice of the peace. From the facts stated in the petition it clearly appears, as we have seen, that appellant was liable for the tax claimed from him. The property charged with the tax, it is admitted, was in fact assessed. It is not complained that an excessive or undue valuation was placed upon it. The only objection made to the assessment by the justice, is, that he did not properly or

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accurately designate or describe on the tax-rolls the property which he in fact assessed. Grant then, that the County Court had no authority to correct the assessment, the original assessment, as made by the justice, still stands, and, *prima facie*, at least, authorizes the sheriff to collect the tax as assessed by the justice. And upon the fundamental principle that a court of equity will not interpose for the relief of one who is himself a wrongdoer, the court below did not err in refusing to perpetuate the injunction. Unless he was willing to do equity, and pay the tax with which his property was justly chargeable, and had, as he admits, been in fact assessed by the proper officer, appellant cannot complain that the court refused to listen to or grant him relief.

There being no error in the judgment, it is affirmed.

AFFIRMED.

HENRY HEATH, ADMINISTRATOR, v. JAMES GARRETT.

1. CLAIMS AGAINST ESTATES—AGENT—ADMINISTRATOR.—An affidavit supporting a claim against an estate made by an agent is not invalid because it does not show such agency; and an administrator knowing the affiant to be the agent of the owner of a claim may approve such claim.
2. CLAIMS AGAINST ESTATES.—In a suit upon a rejected claim against an estate, the withdrawal of an answer and consent to judgment by the administrator, is considered equivalent to an approval of such claim.
3. SAME.—Upon the withdrawal of an answer in a suit upon such rejected claim, judgment by default final may be rendered, if the claim be liquidated and proved by an instrument of writing; the clerk computing damages as in other cases.
4. ENFORCING LIENS.—It is not competent in the District Court to order sale by the sheriff of lands of an estate, against which the vendor's lien is enforced. The order should require the administrator to make sale.

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ERROR from Rains. Tried below before the Hon. Z. Norton.

James Garrett, for the use of Wallace & Co., brought suit against Henry Heath, administrator of the estate of M. H. Heath, deceased, on a promissory note which had been rejected, and to enforce the vendor's lien on lands described in the petition.

The defendant pleaded that the affidavit authenticating the claim was insufficient; it not appearing that Garrett, who made it, was the agent of Wallace & Co. Matters in bar were also pleaded.

The defendant withdrew his answer, and judgment was rendered by agreement of the parties, with stay of execution, "until the first day of March next." Damages were assessed by the clerk as in default; and judgment rendered for the amount claimed and enforcing the vendor's lien ordering the sale to be made by the sheriff.

C. Payme, for plaintiff in error, cited Paschal's Dig., art. 5705; *Johnson's Administrator v. Cheney*, 17 Tex., 336; *Yarborough v. Leggett*, 14 Tex., 677; *Hutchins v. Lockett*, 39 Tex., 165; *Cunningham v. Taylor*, 20 Tex., 126; *Harris v. Crittenden*, 25 Tex., 325; *Davenport v. Chilton*, 25 Tex., 519; *Murray v. Land*, 27 Tex., 89.

L. D. King, for defendant in error, cited *Burton v. Varnell*, 1 Tex., 635; *Cartwright v. Roff*, 1 Tex., 78; *Wheeler v. Pope*, 5 Tex., 262; *Farquhar v. Hendley*, 24 Tex., 300; *McDaniel v. Monday*, 35 Tex., 40; *Sprague v. Litherbern*, 4 McLean, 442; *Boggess v. Blue*, 5 McLean, 143; *St. Clair v. McGehee*, 22 Tex., 5; *Tadlock v. Eccles*, 20 Tex., 791; *Portis v. Hill*, 14 Tex., 79.

GOULD, ASSOCIATE JUSTICE.—The authentication of the claim sued on in this case appears to have been in compliance with the 12th section of the act of the 13th Legislature amending the probate law of 1870, (Gen. Laws 13th Leg., 113.)

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unless, under the section referred to, which directs that the affidavit shall be made "by the owner, his agent, or attorney," an administrator has no authority to allow a claim the authentication of which does not show on its face that it is made by the owner, agent, or attorney.

We do not think that this statute changes the rule settled by repeated decisions under the probate law of 1848, which allows an administrator, if he sees fit to do so, because of his knowledge that as a matter of fact the affidavit is made by the proper party, to accept a claim so authenticated, and holds him to have waived such an objection to the affidavit, unless made when the claim is presented. (*Walters v. Prestidge*, 30 Tex., 74; *Dunn v. Sublett*, 14 Tex., 521; *Shelton v. Berry*, 19 Tex., 154.)

The withdrawal by the administrator of his answer and his consent that the judgment be entered up, may be regarded as equivalent to his allowance of the claim, when, as in this case, the claim is properly authenticated and the evidence necessary to its establishment is an instrument of writing set out in the petition, it is not error for the court to enter judgment by default or by consent.

The objection that the heirs of the deceased should have been made parties may be disregarded, as (if indeed they were proper parties) no such objection was made below, and no such point is assigned as error.

There is, however, error in the judgment of the court, in that it awards execution against the estate through the administrator, and also directs an order of sale to issue to the sheriff. It was not competent for the administrator to consent to such a judgment, and it was error for the court to enter it up. (*Cunningham v. Taylor*, 20 Tex., 126.)

This, however, is an error which may be corrected without remanding the case. (*Thorn v. The State*, 10 Tex., 295.)

It is accordingly ordered that the judgment be reversed and reformed, (at the cost of the appellee,) so as to establish the claim and the lien on the lands described in the petition,

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and so that it be certified to the County Court for its enforcement.

JUDGMENT REFORMED.

A. L. PINSON v. THOMAS E. KIRSH, ADMINISTRATOR.

1. **ATTACHMENT.**—That an affidavit for attachment was, by leave of the court, written upon the original petition after the defendant had answered, that the affidavit was not marked “filed,” and that the petition was not refiled after the affidavit, are not serious objections to an attachment issued thereon.
2. **DAMAGES FOR SUING OUT ATTACHMENT.**—A plea in reconvention alleging that the property seized was not the property of defendant, but that by its seizure the defendant was delayed in moving his family, put to additional expense, and that his family from the delay was exposed, and sickness was caused by the exposure, causing an outlay of money in medical bills, loss of time of defendant and of his family: *Held*, To shew no cause of action.
3. **SAME.**—See statement of the case for damages which are not the natural, proximate consequence or legal result of the seizure of property by attachment, and held to be too remote to be the basis for a recovery.

APPEAL from Anderson. Tried below before the Hon. M. D. Ector.

July 11, 1874, Thomas E. Kirsh, as administrator of William M. Mathews, sued A. L. Pinson on several notes described in the petition. Citation issued and was served. Defendant, July 29, 1874, answered by demurrer and general denial.

April 24, 1875, Kirsh made affidavit for attachment, “that Pinson is about to remove his property beyond the county of Anderson, and that plaintiff will thereby probably lose his debt,” with the other statutory allegations, which affidavit was written upon the original petition, and bore no other file marks. On same day, a bond in amount of \$1,000 was filed, and attachment was issued, which, on the 25th of April, was

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levied upon eighty-two head of stock cattle, valued at five dollars each, and one ox valued at fifteen dollars.

Defendant moved to quash the attachment chiefly because of the affidavit being written on the original petition long after it was filed, and that the affidavit did not appear to have been filed, &c.

Defendant pleaded in reconvention that the cattle levied on were not his property, but were the property of O. A. Pinson, who had been employed by defendant to move his (defendant's) family to Brown county, Texas, and was at the time of the seizure engaged in moving said family; that by the levy of the attachment defendant was delayed in moving fifteen days, was put to extra expense of five dollars per day for said time, and to damage of injury to his business and exposure of his family on the road and in camp, for and during said period of fifteen days, to inclement weather, and damages of sickness, &c., incident to camp life; that his family consisted of an aged wife and minor children—girls and boys; that said property was owned, controlled, and possessed by said O. A. Pinson and not by defendant; that defendant had no property liable to execution. Damages were laid at five hundred dollars.

After exceptions were taken to the attachment, plaintiff, by motion, had the minutes of the court corrected, so as to show a leave of the court to write his affidavit for attachment upon the original petition on the day the affidavit bears date.

By amendment, defendant alleged that, by reason of the wrongful suing out of the attachment, defendant and his family were compelled to camp out, without house or shelter, exposed to the inclemency of the weather, which was bad; that by said exposure, serious illness resulted to himself and family, from which he lost, in time, fifty days, of value to him of \$300; paid out in medical bills, \$100; loss of time of wife and children for thirty days, worth \$100; that although said property was not his, he and his family were so detained by

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the seizure thereof, the same being used by said O. A. Pinson in moving plaintiff to Brown county, as aforesaid.

The plea in reconvention was, on exceptions, stricken out. The motion to quash the attachment was overruled. Judgment for the amount of the notes sued on was rendered in favor of plaintiff, and a sale ordered of the property levied on by attachment. Defendant's motion for new trial was overruled, and he appealed.

T. T. Gammage, for appellant.

Reagan, Greenwood & Gooch, for appellee, cited *Hopkins v. Donaho*, 4 Tex., 336; *Jewett v. Miller*, 19 Tex., 291; *Gaines v. Salmon*, 16 Tex., 312; *Primrose v. Roden*, 14 Tex., 3; *Morgan v. Johnson*, 15 Tex., 569; *Barbee v. Holder*, 24 Tex., 226.

MOORE, ASSOCIATE JUSTICE.—The alleged errors, calling in question the validity of the attachment, because the affidavit on which it issued, was written with permission of the court, upon the original petition after the defendant had appeared and answered; that the affidavit was not marked by the clerk "filed;" that the petition was not refiled after said affidavit was made, and on account of the difference of the filing of the petition and the bond for attachment, are frivolous, and unworthy of serious consideration. Counsel must surely have suffered his zeal for his client to obscure his judgment, or he would not incumber the records of the court with such objections, or consume its time with elaborate discussions in attempting to maintain them.

The court did not err in sustaining the plaintiff's exceptions to defendant's answers claiming damages for the alleged wrongful suing out of the attachment. The answers show upon their face that the alleged injuries for which damages are demanded cannot be said to have been the immediate and proximate result of the wrongful issue of the attachment. If the defendant sustained any damage at all of

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which he can complain, it is from a malicious and wrongful use or abuse of the attachment in its levy, irrespective of the fact of its having been properly or improperly issued. Neither the truth nor sufficiency of the ground for the attachment alleged in the affidavit, are controverted. It is evident from the answers that the attachment was *prima facie* rightfully issued, if the property levied upon belonged to the defendant. The injuries for which defendant asked to be compensated are specifically enumerated and set forth in his answers. They result solely from the fact, as he alleges, that the property levied upon belonged to another party and not to himself. If the property was his, unquestionably, on the allegations in his answers, he has no claim for damages. Surely it cannot be seriously urged that the bare fact that the property levied upon does not belong to the defendant, entitles him to damages which otherwise he could not claim.

We are not called upon to determine, and therefore will not undertake to say, that a party might not suffer damage for which he could maintain an action by reason of the levy of an attachment, either properly or improperly issued, on property of which he was not the owner. But we do say that that to do so he must present an altogether different case from that stated in these answers. The facts alleged must not only be such as will support an action on the bond for the wrongful suing out the attachment, but such as would at common law maintain an action for malicious attachment.

But if the answers were in other respects unobjectionable, the exceptions should have been sustained, because the damages laid plainly appear not to be the natural proximate consequence or legal result of the alleged wrongful act, and are therefore too remote to be the basis for a recovery. (*Plumb v. Woodmansee*, 34 Iowa, 116.)

There is no error in the judgment, and it is therefore affirmed.

AFFIRMED.

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DARCY & WHEELER v. JOHN TURNER & Co.

1. **PRACTICE—STATEMENT OF FACTS.**—Where a statement of facts, filed in case of appeal, is not signed by counsel, but is properly signed by the presiding judge, it will be presumed that it was made in that form because of the disagreement of counsel; and when the statement of facts is only certified to by the judge, as containing “all the evidence material in the case,” the statutory meaning of the certificate is not thereby changed by such qualifying words.
2. **NEW TRIAL—DAMAGES.**—Whilst courts should be slow to interfere with the verdict of a jury on a claim for damages, when the measure of damages is indefinite, they should not hesitate to do so when the error in the verdict is manifest.
3. **FACTS ON CLAIM FOR DAMAGES FOR WRONGFUL SUING OUT AN ATTACHMENT.**—See facts stated in the opinion, which were held insufficient to authorize the verdict on a claim for damages for wrongful suing out of an attachment.

APPEAL from Rains. Tried below before the Hon. Z. Norton.

C. Payne, for appellants.

J. J. Hill, for appellees.

GOULD, ASSOCIATE JUSTICE.—Darcy & Wheeler, merchants, of New Orleans, sued the defendants, John Turner & Co., who were or had been merchandising in Emory, Rains county, Texas, on two promissory notes, which, at the time the suit was commenced, (December 30, 1871,) had both been due for some months, and amounted, with interest, to \$1,415.60. They at the same time sued out an attachment, on the ground that the defendants had transferred their property for the purpose of defrauding their creditors. The attachment was levied on a tract of land of ten acres, and on a town lot in Emory, including a storehouse occupied by defendants. A number of persons indebted to the firm were also served with writs of garnishment. In July following, the writs of attachment and garnishment were quashed on motion of the de-

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defendants. The defendants also answered, denying that they had transferred their property for the purpose of defrauding their creditors, and alleging that the attachment had been sued out wrongfully and maliciously; had resulted in the destruction of their credit and business, and had damaged them and the defendant Turner in a large amount.

The case was tried at the November Term, 1874, and resulted in a verdict by which the jury found for plaintiffs the notes sued on, principal and interest, \$1,796.60. Also for defendants' actual damages to the amount of \$2,250, which the verdict proceeds to say is an "excess of \$553.40 in favor of defendants," and judgment was accordingly rendered in favor of defendants for \$553.40.

Their motion for new trial being overruled, the plaintiffs have brought the case up by appeal, and the principal question in the case is the sufficiency of the evidence to support the verdict.

The jury, in finding the difference between the two amounts named in their verdict, make a mistake of \$100 against plaintiffs, and that mistake is carried into the judgment, and is assigned as error. This error, however, is one which might be corrected in this court without remanding the case.

The appellees contend that the statement of facts is defective and cannot be regarded, because it is not signed by the counsel for either party, and is only certified by the presiding judge as containing "all the evidence material in the case."

In cases of appeal, where the statement of facts is not signed by counsel, but is properly certified by the presiding judge, it will be presumed that it was made in that form because of the disagreement of counsel. (*Harlan v. Haynie*, 9 Tex., 459; *Lacey v. Ashe*, 21 Tex., 395; *Kelso v. Townsend*, 13 Tex., 140.) The use of the words "evidence material in the case," in the judge's certificate, does not change its substantial meaning. The use of some such qualifying words seems not uncommon. (13 Tex., 140; 21 Tex., 395.)

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Our examination of the evidence, as set forth in this statement of facts, has led us to the conclusion that the defendants failed to establish a case entitling them to the amount of damages allowed them by the jury, and that the court erred in refusing to set the verdict aside.

To attempt to give in detail the evidence of each witness would be tedious, and, instead of taking that course, the uncontroverted or incontrovertible facts to be deduced from that evidence will be stated, with the addition of so much of the testimony on contested points as seems necessary to a fair presentation of the case.

The defendants, John Turner and Alexander Cox, during the year 1871, carried on business as merchants in Emory, and stood fair in their credit. As late as March of that year the plaintiffs sold them a bill of goods. Their condition, as stated by Cox, was as follows: They were merchandising on about \$6,000 worth of goods, were indebted about \$8,000, and had assets to the amount of \$10,000 or \$12,000. He afterwards says that they had sold goods on a credit to the amount of \$3,000 or \$4,000, and it would seem that the goods, these claims, and a storehouse, which cost about \$1,000, constituted the assets of the firm. This storehouse was sold by Turner, on whose land it appears to have been situated, before the date of the attachment. Some month or more before the issuance of the attachment they removed the greater part of their stock from Emory to Stringtown, in Hunt county, and, on the 8th day of December, 1871, sold the goods so removed, or so much of them as then remained unsold, to one Morgan, of Hunt county, for the price of \$5,000, taking his note, without security, for the amount, and executing to him a bill of sale, which was placed on record. These goods were invoiced to the amount of \$2,500, and the balance, as Morgan testifies, was guessed at. Morgan, according to the testimony, was a poor man, and there is no evidence tending to show that the sale could be regarded as a profitable or proper business transaction.

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In December, 1871, Darcey, one of the plaintiffs, traveling through the country, heard of the removal of the goods, and turned his course to Emory. At that time, Cox says, they had about one thousand dollars' worth of goods in the house. The sheriff who made the levy says there were very few goods, if any, in the house, and he did not think there were enough to levy on. In fact, they were not levied on, but were afterwards, Cox says, moved away by Turner & Co. Another witness says that defendants were not doing business in Emory where the attachment was sued out. Cox says that Darcey came to him before suing out the attachment, and "that he offered to pay him in notes, or what either of the firm had, their home even." Darcey demanded money, and sued out the attachment and writs of garnishment. The attachment was levied on the two tracts of land, neither of which belonged to the firm. Turner was part owner of one of the tracts, on which was situated a mill, and there is evidence as to damage from stoppage of the mill for from two to four days. The sheriff says it was not stopped at all. There is evidence that the writs of garnishment were served on persons owing the firm about two thousand dollars, of which, after the discharge of the writs, Cox says he collected not much over half. Of the remainder, some, he says, were insolvent, and some not. One debtor to the amount of \$100, Cox says, left the county before the writs were discharged; but could not say what he would have collected. There is no other evidence of damage by reason of the garnishments, nor—save the evidence as to damage to the credit of the firm, which will be detailed hereafter—is there any further evidence of damage worthy of consideration.

Cox testified that the sale to Morgan was in good faith, and that they moved the goods to make room for more. Morgan was introduced, and did not recollect whether the note he gave was due one day after date, or what time it was given, or the rate of interest. Both he and Cox say they told him that any arrangement he might make for their paper

they would allow as a credit on his note. Morgan, it seems, kept the goods about a month, and sold some on time and some for cash, and then entered into an arrangement with two firms, creditors of Turner & Co., who had sued out attachments and were seizing the goods, by which he transferred the goods to them, receiving in payment their claims on Turner & Co., to the amount of about five thousand dollars, and, from the testimony of Upthegrove, who brought about this arrangement on behalf of their creditors, receiving also about four hundred dollars.

Upthegrove testified that Morgan admitted to him that the sale was a sham. Morgan denied any such admission. He says that he turned over the money, &c., to the defendants after he made the sale to the attaching creditors.

Under this evidence, the jury saw fit to find that the attachment was wrongfully issued, and it is not proposed to discuss the correctness of that finding. But certainly there is no evidence of damage to the firm in anywise approaching the sum of \$2,250, unless it be in damage to their credit. There was no seizure of goods or closing of doors leading to loss. The injury by the stoppage of the mill, which, under the strongest view of the evidence, did not amount to very much, was an injury to Turner alone, and certainly cannot support a judgment in favor of the firm. If the evidence on the subject of the garnishees establishes with sufficient certainty any damage, it is certainly no large amount. The only remaining ground is damage to the credit and standing of the firm. There is evidence that prior to the removal of the goods the firm stood fair, and one witness, besides Morgan and Cox, says that this was so up to the date of the attachment.

Several witnesses, however, testify that after the removal of the goods the firm was regarded as in a failing condition. The sale of nearly their entire stock to Morgan and the sale of their storehouse was certainly not calculated to improve their credit. In fact, it is in evidence that another attach-

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ment suit, coming from a different county, reached the office of the district clerk on the night of the same day that plaintiffs sued out theirs. If it be true that the firm ceased to have credit after the attachment, there is no witness who testified that this attachment was the cause. Certainly it is true that the issuance of an attachment against a merchant is well calculated to affect his credit injuriously. Cox says he has not done business since the attachment; that he depended on his credit, which up to that time was good. Since then he has no credit. But here there were other and prior causes existing, calculated to produce the same effect. It requires a stretch of credulity to believe, that the credit of defendants as merchants could have been worth much to them, after the very unusual course pursued by them in their business. The amount of damages allowed by the jury was unwarranted by the testimony; and whilst courts are slow to interfere with verdicts where the measure of damage is indefinite, they should not hesitate to do so where the error of the jury is manifest.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WALLACE & Co. v. A. & L. FINBERG.

1. **MARRIED WOMAN'S LIABILITY ON NOTE.**—If the wife join her husband in the execution of a note for goods purchased for the wife, to replenish a stock of goods that were the separate property of the wife, such purchase would not be for the benefit of the wife's separate property in contemplation of the statute, so as to make her liable on the note.
2. **LIABILITY OF MARRIED WOMEN—PARTNERSHIP.**—The wife cannot be made liable as a partner, to pay a debt contracted in the purchase of goods, to replenish a stock of goods bought by the husband with the wife's separate means.
3. **HUSBAND AND WIFE—PARTNERSHIP.**—Notwithstanding the hus-

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band and wife may assume to act as mercantile partners in trade, and the merchants with whom they deal in the purchase of goods may so recognize them in their dealings, and the attorneys who bring suits on contracts made by them in such dealings may bring or defend suits against them substantially as partners,—it is the duty of the courts, in adjudicating their liabilities, to repudiate the existence of such a relation between man and wife.

4. **ATTACHMENT—HUSBAND AND WIFE.**—In suit by attachment, when the wife's separate property is seized to secure a note made by the husband and wife, but on which the wife is not liable, she may recover the property, as any person might whose property had been illegally attached for the debt of another, by bringing suit or setting up her claim by cross-bill, under leave of the court, in the pending suit to which she had been made a party; and this she can do in her own name if her husband refuse to join her.
5. **DAMAGES IN ATTACHMENT SUIT.**—A defendant in attachment, whose goods have been seized under an attachment wrongfully sued out, is entitled to recover back all the goods not necessary to satisfy the debt, or their value if sold, together with compensation for their detention, which would ordinarily be legal interest upon the value of the whole of the property seized from the time of the levy. If the plaintiff should fail to establish his debt, then the defendant should recover back all the property seized, or, if sold, its value at the time of the levy, with legal interest thereon.
6. **DAMAGES FOR WRONGFUL ATTACHMENT.**—The deterioration in quality and the damages in the price of goods wrongfully seized under attachment, should be pleaded by a defendant specially, since they are not necessary results from an attachment, in order that the opposite party may be prepared, if he can, to meet the evidence offered to establish such contingent injury; and in a suit against husband and wife, where their defenses were conflicting, each asserting claim of ownership to the property seized, and the wife alone pleading special damage, the husband will not be entitled to recover on the special plea.
7. **ATTACHMENT—RECONVENTION—DAMAGES.**—A defendant, whose property has been wrongfully seized under attachment, may plead in reconvention his damage resulting from the malicious and oppressive abuse of the process of the court, by which his property was seized and detained, or he may rely on his statutory remedy, founded upon the law requiring a bond to be given by the plaintiff in attachment to secure against such damage as might be sustained by the wrongful suing out of the attachment. Under the first, exemplary damages may be recovered; under the latter, only actual damages. Such defenses should be presented as distinct causes of action or cross-action, with the averments respectively appropriate

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to each remedy, which are essentially different in the facts necessary to be averred.

3. **ATTACHMENT—PRINCIPAL AND AGENT—DAMAGES.**—If an agent, who makes the affidavit and bond in an attachment proceeding, acts maliciously in doing it, he is responsible; but his malice will not be imputed by presumption to his principal, though his wrong judgment in suing out the writ would be.

APPEAL from Anderson. Tried below before the Hon. M. H. Bonner.

The facts will be found carefully stated in the opinion.

J. J. Ward & R. M. McClure, for appellants.

1. The pleadings of both defendants show they recognized the goods attached as the property of Mrs. L. Finberg, and the jury so returned in their verdict. A. Finberg had no interest in the goods or in this sale, and could not have been damaged. (*Reid v. Samuels*, 22 Tex., 115; 2 Greenl. Ev., §§ 453, 454.) The 6th and 9th errors are included.

2. The answer of L. Finberg set up a foreign judgment, and made the same a part of the answer. The judgment shows it could have had no force in Louisiana, and could have none here. There was no service, either personal or otherwise, on defendant A. Finberg. (*Webster v. Reid*, 11 How., 460; *Nations v. Johnson*, 24 How., 201; *M'Elmoyle v. Cohen*, 13 Pet., 329.) The "Dation in Paiment" was merged in the proceedings and judgment.

3. The defendant is not allowed to traverse the affidavit of plaintiff for an attachment. (*Cloud v. Smith*, 1 Tex., 613; 1 Greenl. Ev., § 341.)

4. The intimate relations of the defendants require indisputable evidence of good faith, and in its absence notice is presumed to L. Finberg. (*Castro v. Illies*, 22 Tex., 502, 503, 504; *Gibson v. Hill*, 23 Tex., 82; *Belt v. Raguet*, 27 Tex., 478.) Public policy forbids her testifying in this cause. (1 Greenl. Ev., §§ 340, 341; 1 Phil. Ev., 77, 78; 2 Kent, 179.) 13th error: There was no service on the defendant A. Fin-

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berg. (*Webster v. Reid*, 11 How., 460; *Nations v. Johnson*, 24 How., 201.)

5. The "Dation in Paiment" was merged in the proceedings and judgment, and the certificates to the same were given after record, and were never duly registered. (*Whitehead v. Foley*, 28 Tex., 288.) Neither could it have any force in Texas. (*McIntyre v. Chappell*, 4 Tex., 187; *Hall v. Harris*, 11 Tex., 300.)

6. The defendants were married in South Carolina. At the time of marriage all property of the wife became the property of the husband; his removing to Louisiana or Texas could not change it, (*Hall v. Harris*, 11 Tex., 300,) and therefore the judgment and "Dation in Paiment" were of no force.

7. Was the conveyance to Harris & Fox fraudulent? If not, was it ever explained? If fraudulent or not explained, the plaintiffs were entitled to their writ of attachment, and no damages could be assessed against them. Was it fraudulent? Finberg continued in possession of the goods, and to sell the same. (1 Tex., 415; 14 Tex., 592; 24 Tex., 517, 518, 519, 624; 28 Tex., 73; 23 Tex., 62, 82; 10 Tex., 397; 1 Smith's Lead. Cases, 33.)

No explanation given before suit or after. (18 Tex., 658; 27 Tex., 145; 1 Story's Eq., secs. 246, 247; 15 Tex., 224; 1 Tex., 337, 423.)

Was there an adequate consideration? The instrument values the goods at \$6,000, Finberg says \$7,000, to pay or secure \$1,200, to the exclusion of his numerous other creditors. Finberg bought goods in market on time. So soon as he gets them in hand his wife claims them as her own, and with her husband conveys \$6,000 or \$7,000 worth of goods to pay or secure \$1,200. Consider he only pays to his creditors after the conveyance less than \$400. He continues in possession of the goods, and to sell the same; he has no other property. The jury gave damages to both the defendants. The court had excluded the plea of L. Finberg for damages, and there could be no proof for her. (35 Tex., 6, 7.) If there

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were damages, it was a legal consequence of their illegal act.

8. The court failed to render a judgment in accordance with the verdict. (5 Tex., 471; 35 Tex., 6, 7; 18 Tex., 68.)

9. The judgment does not state that the jury were qualified as required by law.

T. T. Gammage, for appellee.—The plaintiff in attachment suits is required by statute to file his bond payable to the defendant, &c., conditioned to pay damages, &c. (Paschal's Dig., art. 143.)

If the attachment be wrongfully sued out, the plaintiff is liable to such actual damages as defendant may have sustained by such wrongful act. (*Punchard v. Taylor*, 23 Tex., 427; *Reed v. Samuels*, 22 Tex., 115.)

One of several defendants may recover damages and the other not. (*Punchard v. Taylor*, 23 Tex., 424.)

Actual damages may and of right ought to be recovered. (*Drake on Attach.*, sec. 174; *Culbertson v. Cabeen*, 29 Tex., 255.)

Where fraud, malice, or oppression intervenes, vindictive or exemplary damages will lie. (*Sedgwick on Dam.*, 38; *Graham v. Roder*, 5 Tex., 149; *Smith v. Sherwood*, 2 Tex., 463; *Cole v. Tucker*, 6 Tex., 266.)

An excessive levy is oppressive to defendant and punitive damages may be taxed by the jury. (*Monroe v. Watson*, 17 Tex., 625.)

The verdict of the jury must be clearly wrong before this court will disturb and set it aside. (*Long v. Steiger*, 8 Tex., 462; *Gamage v. Trawick*, 19 Tex., 64; *Perry v. Robinson*, 2 Tex., 491; see also 19 Tex., 152, 226; 15 Tex., 410.)

It is not enough that it is not clear that it is right, or that that there was conflicting evidence. (*Briscoe v. Bronaugh*, 1 Tex., 340; *Edrington v. Kiger*, 4 Tex., 93.)

ROBERTS, CHIEF JUSTICE.—On the 19th day of January, A.

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D. 1874, Wallace & Co. filed a petition on three notes for about \$400, signed by A. Finberg and L. Finberg, and sued out an attachment upon the ground that they had transferred their property to defraud their creditors, which was levied upon a large stock of goods on 24th of January, 1874; that L. Finberg is the wife of A. Finberg is not disclosed in the original petition or writ.

At the March Term of the court, 1874, L. Finberg pleaded that she is, and was when the notes were signed, a married woman, the wife of A. Finberg; that they were not given by her authority, nor for the benefit of herself, her children, or her separate estate. This plea was not signed or sworn to.

At the same term A. Finberg pleaded that it is not true that he had transferred his property for the purpose of defrauding his creditors; that the writ of attachment was maliciously and wrongfully sued out and levied upon one thousand dollars' worth of goods, and his business thereby stopped and his credit ruined, which was good before as a merchant, by which he is damaged \$10,000. He also pleaded payments of sums not credited. He referred to the bond for attachment in a general way, without setting it out, and asked judgment thereon against plaintiffs and their sureties. (Sureties are not made parties.)

At the same term A. & L. Finberg filed jointly a plea in substance the same as the one by him previously filed, stating that the levy was excessive, &c.

In April afterwards the sheriff applied for and obtained an order to sell the goods levied on, as perishable, and on the 29th of that month sold goods amounting to \$879.18; and after deducting \$206.80 expenses thereon, there was placed in the hands of the clerk the sum of \$672.30. The goods sold appear in the sale bill returned by the sheriff as not being all of the goods levied on.

At the July Term, 1874, the defendants filed a joint answer, in reconvention, for \$4,300 damages, for the wrongful and malicious suing out the attachment, stating, that plaintiffs

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induced the sheriff to levy upon their whole stock of goods, of the said value of \$4,300, as shown by the return of the sheriff; that said levy was excessive, being upon the whole of the property owned by them, upon which they depended for a living; that A. Finberg was a merchant, trading on said stock of goods to support himself, wife, and one child; that by the malicious and wrongful suing out of this attachment other creditors were induced also to bring suits and seize upon his said stock; that defendants were unable to replevy the goods, and were thereby thrown out of business to his damage five dollars per day; that they have been deprived of the profits upon the sale of said goods, and by which they have been damaged as claimed as aforesaid.

Afterwards, at the same term, A. Finberg filed an amendment asking that the preceding answer may be considered as an answer filed by him alone, and that the words "A. Finberg" and "defendant" be substituted for the words "A. & L. Finberg" and "defendants," and prayed further for general relief, and damages, &c.; the effect of which was an effort to place A. Finberg in the attitude of having filed a separate answer claiming damages, in reconvention, without respect to his wife's separate interest in the property attached, and treating the property as community property.

Afterwards, at the same term, L. Finberg filed an amended answer first, and asked leave to withdraw her previous answer, and then filed a general answer, setting up that she is and was a *feme covert* and not liable to be sued in this action, &c.; also a general denial; also a plea in reconvention for a large amount of damages for the wrongful and malicious suing out the attachment, and as grounds thereof alleged that the whole of the property levied on, of the value of nearly five thousand dollars, was and is her separate property, by reason of a certain deed, styled "Dation in Paiment," executed, and a judgment thereon rendered in the State of Louisiana, giving her a lien upon the future acquisitions of her husband for about \$1,500, which was alleged to be duly

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recorded in the clerk's office of the county of Anderson, and by which plaintiffs had notice before the levy of said attachment that the goods levied on were the separate property of the defendant L. Finberg, by said record, as well as by actual notice given by her at the time the writ was levied; that said levy was excessive; that the goods were damaged and out of style by being shut up, and the price of them had fallen from not being sold when there was money in the country to buy them; that she lost profits in sales amounting to two and one half dollars per day, and again twenty-five dollars per day; that she had to employ lawyers, whose fees were worth \$300, and she denies that she had transferred her property to defraud her creditors; that the "bulk" of the property levied on was the property sold to her by her husband, and the balance was purchased with the proceeds of it. She alleges that plaintiffs gave bond in the sum of \$1,000, with sureties, and asks judgment thereon, in reconvention, for \$1,000 on said bond, besides damages, as before claimed, ten thousand eight hundred dollars.

During the same term the plaintiffs filed three amended petitions, in the nature of a replication to the claim of reconvention made by each of the defendants, in which plaintiffs alleged that the defendants had been making transfers of their property before and after the levy, for the purpose of defrauding their creditors, and referred to the "Dation in Paiment," executed the 16th of August, 1871, and judgment recorded in the clerk's office of Anderson county, and to the deed of trust upon all their goods in favor of Harris & Fox, executed 16th of August, 1873, and recorded, and gave notice to the defendants to produce said deeds upon the trial; that at the time of the issuing of the attachment, A. Finberg was a merchant in failing circumstances, unable to fully pay his indebtedness; that his wife, L. Finberg, had only a community interest in the property; that he remained in possession of, and continued to dispose of and trade on, his stock of goods after it had been deeded, and held himself out to be the

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owner, and did business in his own name; that for twelve months he had been refusing to pay his debts, and was being sued for them; that if his wife had any goods they were intermixed with the goods of A. Finberg, and that she, by joining the deed of trust, was aiding him to defraud his creditors.

Further, plaintiffs alleged that if the court should hold that the property levied on was the separate property of L. Finberg, that she was liable in this suit, because the goods for which the notes sued on were given, were bought to be used in trade to keep up the stock of goods and for the support of L. Finberg and her child; and A. Finberg had no other property out of which the plaintiffs could make their money.

L. Finberg amended, and said that she had committed no fraud upon her creditors, and that her husband had no authority from her to assume to be the owner of the stock of goods.

Without repeating the various exceptions, it will suffice to say that each party filed general and special exceptions to all the pleadings of the other.

These exceptions coming on to be heard, the exceptions to the original petition were waived. The exceptions of plaintiffs were sustained as to the damage claimed by the wife, L. Finberg, because the husband was not joined with her in her plea of reconvention, no reason being given why he was not; and also as to damages claimed by defendant A. Finberg, for profits and the sum of five dollars per day; and also to plea of payment and to plea of traverse of affidavit for attachment. The other exceptions were overruled.

After these rulings, preceding the trial, there was left the following pleadings standing as properly presented in the case respectively on each side, to wit: the original petition, with the attachment, and also the amended petitions, by way of replication, on the part of plaintiffs. On the part of the defendant L. Finberg, her plea of coverture, a general de-

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nial, and her claim of separate property in the stock of goods. On the part of A. Finberg, a general denial, a plea of reconvention for the wrongful suing out of the writ of attachment, in which no special damage is alleged other than a claim of excessive levy, and a plea of reconvention for the malicious suing out and levying of the writ of attachment, in which the grounds of injury alleged were an excessive levy, the stopping of his business, and the ruin of his credit as a merchant. All of these grounds of action were intermixed and embraced in the same answers.

Under the issues presented by these pleadings the first question presented was, upon the notes being adduced in evidence, as set up in the petition,—who was liable on said notes? There could be no question about the liability of A. Finberg. Mrs. L. Finberg, upon her plea of coverture being established in evidence, would not be liable, unless it was shown that the goods for which the notes were given were purchased by her authority for the use of herself or child, or for the benefit of her separate property. There was no evidence tending to show that the goods were purchased for the special use of the wife or her child under such circumstances as to render her liable on the notes with her husband. If it had been shown by the plaintiffs, that the goods bought from them were purchased by A. Finberg, or by both A. & L. Finberg, to replenish a stock of goods that were, before said purchase, the separate property of the wife, that would not be benefiting her separate property, in the contemplation of our marital rights' law, so as to render the wife liable on the notes with the husband given for the goods bought of the plaintiffs. If it would, the wife's separate property could be invested in a stock of goods for trade, and she and her husband could carry on the business of merchandising as a means of increasing her separate property.

If the husband should use the separate property of the wife in carrying on a mercantile business, it does not render her liable as a partner in the purchase of goods made to

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continue the enterprise; and, notwithstanding the husband and wife may assume to act as mercantile partners in trade, and the merchants with whom they deal in the purchase of goods may so recognize them in their dealings, and the attorneys who bring suits upon contracts made by them in such dealings may bring or defend suits against them substantially as partners or joint obligors, it is the duty of the courts, in adjudicating their liabilities, to repudiate the existence of such a relation between man and wife in this State; for surely the marital relation has become sufficiently complicated already without adding that of mercantile partnership or anything like it.

Upon neither ground, then, could the plaintiff recover a judgment against L. Finberg on these notes.

The next question is, could she, either separately or in connection with her husband, recover any judgment against the plaintiffs. The court treated her plea of reconvention as a cross-action against the plaintiffs; and as she had filed it separately, without joining her husband with her in it, and without assigning any reason why she did not join him, the court decided that she could not recover anything as damages for the wrongful seizure of the goods. This precluded her from a recovery of damages, either separately or jointly with her husband, whether the goods levied on were her separate property or not.

Upon her cross-action for damage being ruled against by the court, and upon her coverture being established, she was substantially out of the case as to a recovery, either against her for the debt or for damages on account of the wrongful suing out of the writ.

If the goods were shown to be her separate property, not being liable on the notes, she could recover her property, as any other person could whose property was illegally attached for the debt of another person, by making claim or bringing suit, or setting up her claim in this suit, of which she had been made a party, upon bringing her suit or cross-

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action, by leave of court, separately, if her husband failed to join her in it.

There was no verdict found upon that part of the plea of reconvention which charged the plaintiffs with malicious conduct, in the issuing and levying of the attachment, and therefore it is unnecessary to consider the case in reference to what might have been recovered under the pleadings upon that head.

The remaining question is, what did the husband, A. Finberg, have a right to recover in his cross-action or plea in reconvention for the wrongful suing out of the attachment?

If the stock of goods levied on was the separate property of the wife, as found by the jury, that negatived the truth of his plea, in which he claimed the property as belonging to him. In that plea he did not define the status of the property, as to its being separate or community, but represented that his stock of goods had been attached, and that he had been wrongfully deprived of the benefit of the use of them, for which he claimed damages.

If it was established that the goods were his, and that the attachment was wrongfully sued out, he was certainly entitled to recover back all of the goods that were not necessary to satisfy the debt, or their value, if sold, together with compensation for their detention, which would ordinarily be legal interest upon the value of the whole of the property seized from the time of the levy. (Sedg. on Dam. 491; Drake on At., 178; Reidhar v. Berger, 8 B. Monr., 160.)

That would be the direct and proximate result and legal consequence of the injury inflicted by a seizure and detention of his property through process wrongfully sued out.

If plaintiff should fail to establish his debt, or if the lien should be held invalid, then he should recover the whole of his property, or, if sold, its value at the time of levy, with legal interest thereon. (Earl v. Spooner *et al.*, 3 Denio, 246.)

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of the goods, if any existed in fact, are grounds of special damage. (Drake on Attach., 180.)

Injuries from these two grounds, though consequential, are proximate, but not certain. They may exist or not exist in any given case, and do not happen as a matter of course. And therefore when they, or either of them, do happen in any case, the party liable to suffer an injury thereby should allege them as grounds of special damage, so as to notify the opposite party to be prepared to rebut, if he can, the evidence offered to prove such contingent injury to the value of the property by its seizure and detention. (1 Chit. on Pl., 370; Sedg. on Dam., 575; Ib., 68; Ib., 492; Squier v. Gould, 14 Wend., 159.)

The defendant A. Finberg, upon showing the suing out of the writ to have been wrongful, might also have recovered damages by reason of the deterioration in the quality and of the depreciation in the price of the goods, consequent upon their seizure and detention, if he had alleged them as special grounds of damage. He failed to do so. The grounds of special damage alleged by him was the loss of credit and of profits in carrying on his business, resulting from the seizure and detention of his goods, which the court, as we may presume, held to be too remote and speculative, and excluded, upon exception to that part of the cross-action, and in the charge to the jury. (Drake on Attach., 176.)

Both of these grounds of special damage are alleged in the plea of reconvention filed by the wife, L. Finberg. But that cannot avail A. Finberg, as both he and his wife, through their respective counsel, took great pains to have their defenses and cross-actions separate, and not joint, and to have the court so to consider them; and the ruling upon the pleadings, show that the court awarded to them that privilege in the trial of the cause brought against them. It was in view of that separate attitude of each defendant, that the court sustained exceptions "to the separate answer of the wife, L. Finberg, setting up claim for damages, the husband

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not being joined therein, no reason being given why he was not so joined, and he, in his answer, having set up claim for the same damages." It is true, as here said, that A. Finberg did claim the same damages, but did not allege these grounds of special damage, as was done by his wife in her separate answer.

Under his pleadings, then, A. Finberg, under the ground of a wrongful suing out of the attachment, was confined, in his recovery of damages, to compensation for the detention of his goods, which was legal interest on their value, stated by his plea, and proved by one of the witnesses, who assisted in taking the inventory, to be \$4,317.41. And the goods having been attached on the 24th of January, 1874, and the trial and judgment having been on the 27th of August, 1874, the interest upon their estimated value for that time (seven months and three days) amounted to a little over two hundred dollars. The jury, in finding damages to the amount of \$643.32, must have acted upon some other ground of damage than that alleged by A. Finberg.

It is evident that the jury did not find this amount as the value of the goods or any part of them, because they found the goods to belong to Mrs. L. Finberg; and it was alleged and shown in the evidence that the goods were held under other process by the sheriff at the time of the trial, and there was no allegation in the pleading or issue formed as to the sale of them, notwithstanding it does appear in the record that a portion of them were sold as perishable property, at the instance of the sheriff, by order of the court. A. Finberg stated in his evidence that they were worth, when levied on, an amount nearly three times what they brought at the sale. That, however, was a matter outside of the pleadings in the case; and if A. Finberg had desired to recover for the damages done him in the sale, he should have alleged such facts as would have put that matter in issue. (Sedg. on Dam., 575.)

It is not thought necessary now to discuss the weight of the evidence tending to prove that the writ was not wrong-

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fully sued out, or the contrary; nor the admissibility of the evidence offered and adduced on that subject, including the deed of "Dation in Paiment" and the deed of trust. The effect of such transfer, with the attending circumstances, upon the rights of creditors must generally be left to the jury under instructions from the court, subject to the sound discretion of the court in sustaining or setting aside their findings, upon a motion for new trial. (*Carlton v. Baldwin*, 22 Tex., 724.) The court charged the jury that they must disregard the claim of damages for the malicious suing out and levying of the writ of attachment for the want of evidence to sustain it, and the jury acted accordingly. It is worthy of notice, however, that the defendant, A. Finberg, in his several answers in reconvention, joined together the common-law remedy, in the nature of an action of trespass on the case, for the malicious and oppressive abuse of the process of the court, by which his property was seized and detained, and the statutory remedy founded upon the law requiring the bond to be given by the plaintiff in attachment to secure the defendant in such damages as he might sustain by the wrongful suing out of the attachment. (*Donnel v. Jones et al.*, 13 Ala., 510; *Wilson v. Outlaw*, Minor, 376; *Kirksey v. Jones*, 7 Ala., 622; *Drake an Attach.*, 157, 158, 159.) As in that first mentioned, exemplary damages can be recovered, and in the other only actual damages, they should more properly be presented as separate and distinct causes of action or cross-action, with the averments respectively appropriate to each remedy, which are essentially different in the facts necessary to be averred. The practice, however, has been to present them together, and there has been no ruling of this court adverse to it. Had the course here recommended been pursued in this case, it would have avoided the perplexity and confusion attending such complicated issues, by rendering it obvious, before the trial commenced, that the plaintiffs might be held liable for the wrongful, but not for the malicious use of the process of attachment, sued out by their agent, Carey, and not by them-

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selves. If the agent who makes the affidavit and bond acted maliciously in doing it, he is responsible; but his malice would not be imputed by presumption to his principals, while his bad judgment in wrongfully suing out the writ would be. (Drake, 182; *McCulloch v. Walton*, 11 Ala., 492.)

The jury, under the instructions of the court, found four distinct verdicts, to wit: 1st, in favor of plaintiffs against the defendants jointly on the notes; 2d, that the goods were the separate property of the wife, L. Finberg; 3d, that she had a prior lien to the amount of fifteen hundred dollars; 4th, that the attachment was wrongfully sued out; and they assessed the actual damages of defendants, A. and L. Finberg, against the plaintiffs at the sum of \$643.32.

The court approved the first and fourth verdicts, declaring and treating the second and third as immaterial, and rendered a judgment in favor of the plaintiffs against the defendants on the notes sued on, (\$499,) and in favor of defendants against plaintiffs for the damages assessed, (\$643.32,) but in substance a joint judgment in favor of A. and L. Finberg against the plaintiffs for the difference, being the sum of \$144.32 as damages.

There is nothing to indicate that this was designed as a finding by the jury, and a judgment by the court in favor of the husband and wife for the benefit of the wife.

It stands, without qualification, a judgment in their favor, as joint owners or partners in trade, for a certain sum, after deducting an amount due to the plaintiffs by them in the same capacity. It is not perceived upon what principle such a judgment can be rendered consistently with the pleadings and evidence in this case. There was no competent evidence to render her liable, as a married woman, on the notes, whether the property was community or separate property. If it was her separate property, he had no right to recover in his own right jointly with her; and if it was community property, she had no right to recover jointly with him damages for the wrongful suing out of the writ. Besides this,

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the defendants had severed in their defenses, and her claim for damages had been excluded by the court, in passing upon exceptions to the pleadings, before the case was submitted to the jury.

We find, amidst twenty assignments of error, the following, to wit:

“18. The jury erred in their verdict, and the same is contrary to law and the evidence.

“19. The court erred in overruling plaintiff’s motion for a new trial, and rendering a judgment not in accordance with the verdict.”

The verdicts, in whole or in part, do not conspire to any definite legal result that would enable the court to render a judgment in harmony with the case made by the parties in their pleadings and evidence.

We are therefore of opinion that the judgment is erroneous, and must be reversed and the case remanded.

REVERSED AND REMANDED.

WILSON LUMPKIN, EXECUTOR, ET AL. v. AMANDA E. MURRELL
AND HUSBAND.

1. **ASSIGNMENT OF ERRORS.**—When the assignment of errors points out no specific error, this court will not reverse, except for errors manifest in the record, going to the foundation of the action, or because the judgment appears to have resulted from manifest error, and to be in its effects too grossly inequitable to receive the sanction and approval of a court of justice.
2. **CONVERSION—TRUST PROPERTY.**—We know of no rule by which one can be held to have converted property to his own use and still hold it in trust for the owner. The owner may have the right to elect whatever he will sue for tort or bring his bill for an account, but it would be inequitable for him to do both.
3. **COMMUNITY PROPERTY—RIGHTS OF SURVIVOR.**—It seems that the surviving husband, who has kept control of and has managed the community property after the death of the wife, should not be

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charged with the wrongful conversion of such property in a suit by the heirs of the wife, such possession being lawful, and his liability being only as trustee.

4. **COMMUNITY-PROPERTY ACT.**—The statute of August 26, 1857, (Fascial's Dig., 4647-49,) seems to have been intended as a privilege and not as a limitation upon the rights of the surviving husband. If he fails to avail himself of it, he may be held to a stricter accountability than that imposed by the statute, in the settlement with those jointly interested with him in the property.
5. **LIMITATION—SAME.**—In a suit for conversion in such case, limitation would run from the date of such act complained of.
6. **SEE DISCUSSION** of charges improperly allowed in a suit by the children of deceased wife against the estate of the surviving husband—rents, hire of slaves, interest, &c.
7. **CONFEDERATE MONEY.**—The court will take notice of the absence of money, other than Confederate bills or notes, during the Confederate war; and will not allow for rents, interest, hire, &c., against a trustee, without proof that they were actually received during that period, and by the trustee.
8. **COMMUNITY PROPERTY—ESTATES—SETTLEMENT.**—To settle on just and equitable principles the rights of the children of a former marriage, claiming in right of their mother against the children of a second marriage, and some of the children claiming under a will of the surviving husband, an account should be taken between the estate and heirs of the first wife, and that belonging to such heirs partitioned among them; as to the residue, the legatees should have the privilege of electing whether they will take as heirs or legatees.
9. **EXPENSES OF REPAIRS.**—In this case the expenses of repairs of a storehouse were charged to one heir, (by oversight :) *Held*, Error; her *pro rata* of interest should bear the same proportion of expense of repairs.

APPEAL from Anderson. Tried below before the Hon. M. H. Bonner.

This case can be understood from the opinion. The nature of the controversy does not admit of an abstract of the pleadings, exhibits, evidence, orders, &c., contained in the record of about four hundred pages.

The case went to the jury on twenty-six special issues. They and the assignment of errors sufficiently appear in the opinion; except that the second of the assignments by appellee, pointed out that in the account the whole of expenses of

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repairing a storehouse had been charged to the share of plaintiffs instead of to the estate.

Word & Williams, for appellant.

Reagan, Greenwood & Gooch, for appellee.

MOORE, ASSOCIATE JUSTICE.—This suit was brought by appellees to recover from the appellant Lumpkin, the executor of John Murchison, deceased, her father, the share or interest which she claimed as an heir of her deceased mother, Pauline H. Murchison, in the community estate of her said father and mother, as well as her part of her mother's separate estate, which had come into his hands as such executor, and to recover for use, occupation, and enjoyment of said property, together with interest thereon, and all profits derived, or which by reasonable diligence might have been derived, therefrom by her father subsequently to her mother's death, and by said executor, and also for damages for the improper and unauthorized use and wrongful conversion of any of said property by her father or said executor.

It is alleged in the pleading, and the evidence shows, that said John Murchison and his first wife, Pauline H. Murchison, were married in the Republic of Texas on the 16th day of July, 1843; that said Pauline died on the 16th of August, 1859, leaving as the issue of said marriage the plaintiff, Amanda E., and the defendants, John M. Murchison and William E. D. Murchison, all of whom were then minors; that at the date of said Pauline's death both she and her husband owned separate estates, and were possessed of a considerable amount of both real and personal property belonging to them in common, against which, so far as is shown in the record, there were no debt or incumbrance of any character. Said Pauline died intestate, and no administration was ever had on her estate; and said Murchison, without having any inventory and appraisement of community estate of himself and wife made and filed in the County Court, retained pos-

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session of all of said community property, and occupied, used, and disposed of the same in the manner he had done prior to said Pauline's death; that on the 4th day of April, 1860, said Murchison married his second wife, Mary Bruton, who died on the — day of March, 1865, leaving surviving her, as the issue of this marriage, the defendant, William H. Murchison. During this marriage said Murchison was engaged in, and carried on large business transactions, some of which had been undertaken and commenced during the life of his first wife, and at the death of his second wife was in possession of a large amount of both real and personal property, all of which appellees seem to insist was purchased or procured with the community property of the first marriage or the profits derived from the use and disposition made of it; and without making an inventory of the community property of himself and second wife, Murchison still continued, after her death, to deal with and use all the property in his possession and under his control as if it was his separate estate, until his death, on the 15th of April, 1872; and in making his will he seems to have been oblivious of the fact that his children owned an interest in, or could justly assert a claim to any part of it.

The appellees, B. F. Murrell and Amanda E. Murrell, were married on the 15th day of August, 1865, she being then about sixteen years of age. No demand, however, seems ever to have been made of her father, by either her or her husband, for her share of her mother's estate in the community estate or for a settlement thereof; nor does it appear that any such demand was made of the executor prior to the bringing of this suit.

This brief recital of a few of the facts connected with the matter in controversy in this case will show that its proper determination must be attended with serious and unavoidable difficulty and embarrassment.

The difficulty in the proper adjustment of the matters in controversy are obviously in no way lessened, when it is also stated, that at the death of his first wife Murchison was largely

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engaged in merchandize, which he continued until some years subsequent to his second marriage; that the personal property belonging to the community consisted mainly of the goods on hand at the date of his wife's death, and notes and accounts owing for goods previously sold; while from the statement of facts there seems to be but slight and unsatisfactory evidence now accessible, which will enable us to say what portion of the assets of the first community were invested in the business done during the second; or what part of the funds which were realized when his mercantile business was finally wound up should go to the one or the other of the respective community estates, and how the heavy losses which the business ultimately suffered, should be apportioned between them.

Considering the magnitude and importance of the questions in this case, and the inherent difficulties involved in their proper determination, and that two of the defendants were minors and represented by guardians *ad litem*, we are constrained to say that a careful examination of the record does not impress us with the conviction that such a solution of them has been attained as fully comports with equity and justice, or as will result in the distribution of the community property of Pauline H. Murchison equally and fairly between her children, or so as not to result in serious injustice to the minor defendant, William H. Murchison, in respect to his interest in the community estate of his mother. But while this is so, it cannot be said that the assignment of errors by appellants points to any tangible and positive error in the record for which the judgment should be reversed, if indeed they are not so vague, indefinite, and general as to preclude our looking to them.

The first error assigned is, that the court erred in its instructions to the jury. The charge is full and somewhat exhaustive in presenting the views of the court upon the points discussed; and the law in respect to them seems to us clearly and forcibly developed. The errors in the judgment,

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as we apprehend it, result from a misconception of the true character of appellee's demand, its nature and extent by the parties, and probably to some extent by the court; the failure of appellants to present the proper defenses, and the exaggerated, if not in some instances unwarranted, amount found by the jury in their answers to some of the special issues, rather than from any erroneous instructions from the court on the questions embraced in the charge. But if there are any errors in it, as has been often said, such an assignment as this fails to properly point them out. It is also to be noted that no instructions whatever were asked of the court by appellants.

The second error is in admitting evidence to show the amount of property acquired by Murchison after the death of his wife. In view of the issues upon which the case was tried, it is not seen why such testimony might not have been properly admitted. But if not, the record does not show that any such objection was made or any exception taken to the ruling of the court upon it. The record contains no bill of exceptions taken by appellants to this or any other ruling of the court during the entire course of the trial.

What has been said in reference to the second assignment is equally applicable to the third.

The fourth error complained of is, that the verdict was found without evidence to support it. This assignment, in view of the facts of this case and the number of issues submitted, is evidently too general; it does not point to any specific error. The verdict consists of the response of the jury to twenty-six special issues submitted to them by the court. On many of these issues, if not all of them, the evidence certainly supports the finding.

The fifth error points with more particularity to the finding of the jury complained of. But it evidently is not well taken. There was, undoubtedly, evidence before the jury from which they might have reached their conclusion on a number of the issues submitted to them. Nor was this objec-

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tion to the verdict presented to the court in the motion for a new trial, as unquestionably it must have been to enable appellants to avail themselves of it as error.

The remaining error complained of in the assignment, is in overruling the motion for a new trial. The grounds presented in support of this motion are equally vague and indefinite as the assignment of errors.

The first and second grounds of the motion for a new trial merely allege in general terms that the finding of the jury is contrary to the law and contrary to the evidence. The third says the jury disregarded all the rights of the defendant William H. Murchison in the community property of his father and mother. But in what particular his rights were disregarded is not stated. The fourth and last ground for the motion alleges that the verdict of the jury on the various issues submitted to them, does not show such a finding as to enable the court to render a judgment, but wherein it is insufficient is not pointed out.

And, that the case was not presented either in the pleadings of the parties or the special issues submitted by the court in a manner best calculated to lead to its proper determination, it may be replied, if the proper objections to the petition were raised by the demurrer, it does not appear that they were clearly pointed out and called to the attention of the court; and if they were, the ruling of the court upon them is not complained of or assigned as error. No objection was taken to the submission of the case to the jury on special issues, or to any of the issues submitted, suggested, or asked for by appellants. If, therefore, the judgment can be reversed, it must be for errors going to the foundation of the action, or because it plainly appears to have resulted from manifest error, and to be in its effects too grossly inequitable to receive the sanction and approval of a court of justice.

It remains for us to consider whether there is any such error apparent in the record.

From what has been heretofore said, it is manifest that ap-

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pellees sought to recover one third of all the real and personal property in the hands of Murchison's executor, which constituted a part of the community estate of Murchison and his first wife; and also to hold the estate liable to a like extent for the value of community property at Mrs. Murchison's death, which has not come to his hands. Appellees seem to suppose that the failure of the surviving father to file an inventory of the community estate of himself and deceased wife is a violation of a duty absolutely incumbent upon him, and that without filing such inventory he can in no way meddle with any of said community property without becoming liable to the heirs of the wife for its wrongful conversion; that the heirs are entitled to recover from the surviving husband the full value of the property at the death of the wife, and interest thereon up to the date of judgment, notwithstanding it has been subsequently destroyed or greatly deteriorated in value, without any fault on his part; and that if any of the property has increased in value, or forfeits have been made from its use, the heirs may have the benefit of such profits and increase in value. To maintain these propositions, the surviving husband must be regarded as having wrongfully converted the wife's share of the property to his own use, and also as holding it, notwithstanding such conversion, in trust for her heirs. It is true, parties who wrongfully intermeddle in the affairs of others may be treated as trustees in their own wrong; but we know of no rule by which one can be held to have converted property to his own use and still hold it in trust for the owner. The owner may have the right to elect whether he will sue for tort, or bring his bill for an account; but surely it would be inequitable for him to do both.

There seems to us serious, if not insuperable, difficulty in holding that Murchison's failure to file an inventory, and his subsequent dealing with the community property, entitles appellees to a recovery for a wrongful conversion. To so hold, would be to ignore his community rights, or to make their

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enjoyment depend upon his filing an inventory. The statute seems to us to have been intended as a privilege, and not a restriction or limitation upon the rights of the surviving husband. If he fails to avail himself of it, he may be held to a stricter accountability than that imposed by the statute in a settlement with those jointly interested with him in the property. But though he may be called to account at any time, surely his retention of the property and its preservation from loss, as by use or disposal of such of it as is of a perishable character, the collection of notes which would otherwise be lost, if not his absolute duty, cannot be regarded as a trespass. It is his duty, as has been often said, to settle the community debts, and he may use community property for this purpose. In addition to these suggestions, we may also remark that, if appellee's suit is to be regarded as an action for the value of property wrongfully converted by Murchison, it would seem that they must have been defeated by the plea of limitation interposed by defendants in their answer.

It appears from the special issues submitted to the jury, and the judgment upon them, that the court below, as we think, very properly limited appellee's right to a recovery by Murchison's liability as a trustee of the community property. But although the court seems to have held that Murchison was merely liable as a trustee, we think his estate has been held to a stricter rule of accountability than, in view of all the facts and circumstances of the case, equity and justice demand; and that neither the answers of the jury to the special issues nor the judgment upon them is supported by the evidence or does full justice to all the parties interested in the estate.

By the judgment, Mrs. Murrell's portion of the real and personal property pertaining to the community estate of her father and mother, found in the hands of the executor, is ordered to be set apart to her. She also recovers judgment for her share of the community property sold by the executor. To this we think there can be no objection; but the

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court also gives her judgment for one sixth of the rent fixed by the jury on the homestead from the date of Murchison's removal from it until his death, and rent of the storehouse from the time his wife died, and also one sixth of the amount assessed for hire of community negroes from Mrs. Murchison's death until their emancipation, and one third of the hire of the negro found to be the separate property of Mrs. Murchison for the like period, computing interest on each annual installment of rent and hire, though there is no proof that any rent or hire was actually realized by Murchison, and though it is an historical fact of which no one is ignorant, that during a considerable portion of the time that these charges are allowed there was no money in circulation, and such prices for rent and hire could have been realized only in Confederate paper. The entire hire of the negro belonging to Mrs. Murchison's separate estate is treated as belonging to her children, though her husband unquestionably inherited one third of her separate property. She also recovers judgment for one sixth of the full amount realized by Murchison on his *ante bellum* notes and accounts, and of the value of the goods on hand at his wife's death, and interest on both these sums, though it can scarcely be doubted that the notes from which the first of these sums was realized must have accrued in part from the sale of these goods.

By aggregating these different sums it will be found, that the court held appellees entitled to claim from Murchison's estate, in addition to the specific property adjudged to them, something over ten thousand five hundred dollars.

No misappropriation or waste of any of the community property which came into Murchison's hands is shown by the evidence, and, as far as the issues submitted to the jury go in this direction, the verdict repels such a conclusion; yet the jury finds, in reply to issue No. 25, that the amount of the community property, not computing insolvent debts or lands, which came to the hands of the executor is only thirty-eight thousand six hundred and eighty dollars and ninety cents.

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This, of course, includes the personal property ordered by the court to be partitioned, which is of the value of three thousand four hundred and forty dollars and fifty cents. Deduct this sum from the amount which came to the executor's hands, there would be thirty-five thousand one hundred and forty dollars and forty cents to be divided, of which appellees' one sixth would be but five thousand eight hundred and fifty-six dollars and seventy-five cents. The discrepancy in the conclusion to be drawn from the finding of the jury on the different issues, may be in part accounted for from the fact that those on which the judgment is rendered are swelled by interest, from the qualification of the executor until the date of the judgment, which was about three years; but it is no doubt in a greater degree attributable to charging for rents and interest never realized, and an amount and interest on it never realized for the goods on hand at Mrs. Murchison's death. It may also be well to note, that while eight per cent. is allowed on fifteen thousand dollars of community funds put into the cotton factory, the entire property, exclusive of the land on which it was situated, and the engine and boiler, on the value of which last appellees were allowed interest, rents for only sixteen hundred and sixty-six and two thirds dollars. Appellees also get the benefit of the original investment, while the property seems from the inventory to have shrunk in value from thirty-five thousand to twenty-two thousand dollars.

There is another fact affecting the correctness of the judgment, which must be adverted to. While the jury find that Murchison collected sixteen thousand dollars from the debts due the community estate of himself and his first wife, there is nothing in the record to warrant or support this finding. The testimony shows that he may have realized this amount from debts due him in and prior to 1861, or when he closed his mercantile business; but his first wife died in August, 1859, and it is proved that he subsequently bought, on one trip to New York, a stock of goods of the value of twenty thousand dollars. He married his second wife in the spring

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of 1860, and it is certainly unfair to his child by this marriage to hold that the entire amount realized from the old debts belonged to the community estate of the first wife.

Other objections to the verdict might be pointed out, but enough has been said, we think, to show that to affirm the judgment would result in a most unfair division of the community property of Mrs. Murchison among her children, and would do gross injustice to the minor, William H. Murchison, the issue of the second marriage. And although the case was not presented, either in this or the District Court, as it should have been, justice requires that it should be reversed.

To settle, on just and equitable principles, the rights of the parties, an account should be taken, on fair and equitable principles, between Murchison's estate and the heirs of his wife, Pauline H. Murchison, and one third of the amount for which the executor is found to be accountable to her heirs should be adjudged to appellees. If it should be found that the rights of either of the heirs in the community estate, and as devisee in Murchison's will, conflict, then they should be required to elect whether they will claim as heirs or devisees.

As appellees have also assigned errors, it is proper for us to say, though it seems hardly necessary to do so, that their second assignment is certainly well taken. The ruling in question was merely the result of oversight or inadvertence. What has already been said will suffice in reference to the other assignments.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOSEPH WOOSLEY v. JOHN R. McMAHAN, ADM'R.

1. DEPOSITIONS, OBJECTIONS TO.—Only such objections as go to the form and manner of taking depositions are required to be made in writing, and notice thereof given before the trial. Objections to the

Argument for the appellant.

answers of witnesses made in depositions as hearsay, secondary, or irrelevant evidence, may be made when the testimony is offered.

2. **PRACTICE.**—The admission of improper testimony over objections properly taken is cause of reversal, unless it appears that the testimony was immaterial.
3. **PRACTICE IN DISTRICT COURT.**—The refusal of a court, at a former term, to sustain exceptions to imperfect pleadings is not a reason for adhering to such ruling when again urged at a subsequent term.

APPEAL from Rains. Tried below before the Hon. Z. Norton.

James Lynch sued Woosley to recover money paid by him for a note on L. Moody, payable to N. A. Birge or bearer. The petition alleged that Woosley represented the note to be for \$2,500, when in fact it was only for \$25; that petitioner is illiterate and cannot read, and in making the purchase of the note on Moody acted on the representations of Woosley; that Woosley guaranteed the note to the amount of \$400, the amount paid therefor. As further cause of action, plaintiff set up that defendant had sold land for plaintiff, and had not accounted for the proceeds, which were set out and judgment therefor asked; and also for the proceeds of the sale of forty-six head of jacks and janets and one yoke of oxen sold by defendant for plaintiff and proceeds not accounted for.

The defendant demurred, and pleaded in set-off a note for \$200 on plaintiff.

The depositions of a witness, Weaver, were read, over objections, giving a statement of Birge, the maker of the note in controversy. Birge's testimony was also taken, and Weaver's depositions were not offered to impeach Birge's testimony, which was different as to his statements as testified to by Weaver. No exceptions had been filed to the depositions of Weaver before the commencement of the trial.

It is not deemed necessary to report the voluminous pleadings criticised in the opinion of the court. Judgment was rendered for plaintiff, and Woosley appealed.

Stephen Reaves, for appellant.

Opinion of the court.

C. Payme, for appellee.

GOULD, ASSOCIATE JUSTICE.—The statute under which depositions of witnesses may be taken and read in evidence makes them “subject to all legal exceptions which might be made to the interrogatories and answers were the witness personally present before the court giving evidence.” (Paschal’s Dig., art. 3733.) It is further provided that “no objection to the form of depositions, or to the manner of taking them in any suit, shall be heard, unless they are in writing, and notice thereof is given to the opposite counsel before the trial of the suit commences.” (Paschal’s Dig., art. 3742.)

It appears by bills of exception that the depositions of the witnesses Weaver and Stockton were objected to as hearsay evidence, and as secondary and irrelevant evidence, and that the court overruled the objections, on the ground that they were not made in writing before the commencement of the trial. If evidence is inadmissible because it is hearsay, or because it is secondary in its character, or because it is irrelevant, these are objections which might be taken if the witness were present before the court, and not objections going merely to the form and manner of taking the depositions. In support of the ruling of the court below, we are referred by counsel to *Allen v. Atchison*, 26 Tex., 628. That case involved a different question, viz: the mode of excepting to the answers made by a party to the suit to interrogatories propounded to him by the opposite party, as containing matter not responsive or permissible—a question arising and decided under a different statute. (Paschal’s Dig., art. 3750.)

The objection to Weaver’s evidence that it was hearsay, was well taken, and, as it extended to his entire testimony, his deposition should have been excluded. Without inquiring as to whether Stockton’s deposition should also have been excluded, it is sufficient to say that the court erred in admitting improper evidence to go to the jury, though objected to

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at the proper time and in the right mode, and that we are unable to say that the evidence admitted was immaterial. Indeed, looking to the amended petition of plaintiff and to the charge of the court, it is difficult to arrive at the issues intended to be made, or on which the case was tried. The defendant does not seem to be responsible for this, for he filed repeated and special exceptions to the amended petition, and it appears by bill of exceptions that the court refused to act on the last exception, because "a former general and special demurrer had been overruled by the court on said pleadings, at a former term of the court." The record does not otherwise show the action of the court on any of the exceptions taken. If in fact the court had overruled the exceptions to the amended petition because it was argumentative and uncertain and not a clear statement of a cause of action, it was error to do so; and the results of the error are manifest in the uncertainty as to the issues on which the jury intended to pass. The court might well have entertained the special exceptions, to which its attention was called, although in fact other exceptions had been before overruled.

It has not been deemed necessary to consider the minor error assigned. Because the court erred in admitting improper testimony, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

W. T. BLYTHE, GUARDIAN, v. C. M. HOUSTON ET AL.

1. GRANT—PRESUMPTION—INNOCENT PURCHASER—TESTIMONIO—EVIDENCE.—By the XIVth Article of the Provisional Government of Texas, all land commissioners were ordered forthwith to cease their operations during the unsettled condition of the country. That article went into force on the 13th day of November, 1835, after which date any title issued by a commissioner was a nullity. The plaintiff, after taking depositions to prove the genuineness of the testimonio of a grant, which testimonio purported to have been

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issued on the 15th of November, 1835, introduced on the trial the protocol of the grant or title of possession, issued by George W. Smyth, commissioner, with date as follows: "Given at the town of Nacogdoches, —, A. D. 1835." The protocol showed the date of the application and the order of survey to be September 15, 1835, and the date of the field-notes and of the order that title issue, to be November 11, 1835. The genuineness of the testimonio was questioned under oath, and both the protocol and a translation of the testimonio were in evidence: *Held*—

1. **PRESUMPTION IN FAVOR OF ACTS OF PUBLIC OFFICER.**—

That the suspicion which might grow out of the irregularity of the protocol in its date alone should not prevent the operation of the presumption that the commissioner who issued it acted in all respects in conformity to law.

2. **SAME.**—In the absence of any evidence of the date of a grant issued in 1835, the law would presume that the commissioner acted in the extension of title at a time when he might legally do so; and that the true date was prior to the closing of the land office, in the absence of evidence sufficient to overcome such presumption; and after the lapse of thirty-five years the evidence required to rebut the presumption must be full and satisfactory.

3. **PRESUMPTION—INNOCENT PURCHASER.**—In favor of innocent purchasers, the presumption of the regularity and validity of a grant will be so strengthened, by acquiescence and the lapse of time, as to stand until rebutted by satisfactory evidence.

4. **EVIDENCE.**—But this presumption could not prevail to validate a grant without date except "——, 1835," if the genuine testimonio of the grant showed that the title was extended after the close of the land office in 1835, unless it was shown by evidence that the testimonio was issued on a day subsequent to making the protocol.

5. **PROTOCOL AND TESTIMONIO.**—The making of the protocol and the issuance of the testimonio were ordinarily contemporaneous acts.

6. **EVIDENCE—PRESUMPTION.**—The statement of facts failed to show that what purported to be the original Spanish testimonio was ever read to the jury, but did show that what purported to be a translation thereof was read without objection, and that the Spanish document was attached as an exhibit to a deposition which was read, and in which it was referred to, and also that it was exhibited to a witness on the stand during his examination. The party who objected on appeal to the Spanish original being regarded in evidence, had himself asked an instruction on the trial, based on the hypothesis that the paper had been read:

Argument for the appellant.

Held, That under these circumstances the original Spanish testimonio must be regarded as having been in evidence.

7. **TESTIMONIO—EVIDENCE.**—The testimonio is a second original, and may be resorted to for the purpose of supplying the defects of the protocol.

8. **EVIDENCE—CHARGE OF THE COURT.**—The testimonio being in evidence, bearing a specific date showing the issuance of title after November 13, 1835, it was the duty of the court to submit to the jury a charge based on the hypothesis of its genuineness.

2. **EXPERTS—EVIDENCE.**—It is no objection to the deposition of a witness who translates in his evidence a Spanish document, that it had not at first been shown that the witness "was a Spanish scholar and competent to correctly translate the Spanish language into English," when his deposition disclosed the fact that he had once filled the post of Spanish translator in the General Land Office, and wrote and spoke the Spanish language.

3. **CERTIFICATE OF ACKNOWLEDGMENT—NOTARY PUBLIC.**—A certificate of acknowledgment of a notary public, beginning "The State of Texas, county of Hopkins," which recites the appearance of the parties before the "undersigned authority," and closes as follows, viz: "witness my hand and official seal, at Douglass, this 6th day of October, A. D. 1854, (signed) John B. Clute, Notary Public, N. C.," and in other respects formal, is good; the discrepancy between the county named in the outset and the initial letters appended to his signature is not of sufficient importance to invalidate the record.

4. **EVIDENCE.**—A plaintiff who relies on a protocol executed with no other date than "——, 1835," may prove the genuineness of the handwriting of the officer by whom the title purports to have been issued, and also by parol testimony, that a witness was present when the officer issued a grant to the grantee under whom plaintiff claims,—its location, size, or date not remembered; such evidence is admissible to remove any suspicion of the protocol growing out of the blank date.

APPEAL from Hopkins. Tried below before the Hon. W. H. Andrews.

The facts of the case will be found very fully stated in the opinion of the court, delivered in *Ury v. Houston*, 36 Tex., 265.

Bennett, Ballinger & Bennett, for appellant.

King & Camp, also for appellant.

Argument for the intervenors.

No briefs for appellees have reached the reporters.

William C. Loring, for intervenor Bondies.—The following are the principal authorities bearing upon the points involved in this case, and relied on, and upon which it must be determined: *Smith v. Townsend*, Dallam, 571; *Herndon v. Casiano*, 7 Tex., 323; *Paschal v. Perez*, 7 Tex., 349; *Edwards v. James*, 7 Tex., 372, 373; *Titus v. Kimbro*, 8 Tex., 213, 214; *Hubert v. Bartlett*, 9 Tex., 97; *Watrous v. McGrew*, 16 Tex., 511, 512; *Swift v. Herrera*, 9 Tex., 279–280, 281; *Wheeler v. Moody*, 9 Tex., 375, 376; *Johnston v. Smith*, 21 Tex., 722; and especially see the argument of the court in the last case; much of this decision directly bears upon the points involved in the case before the court; *Bowmer v. Hicks*, 22 Tex., 155; *Nicholson v. Horton*, 23 Tex., 50; *Portis and Wife v. Hill and Wife*, 14 Tex., 69; this case refers to the law governing partitions; *Howard v. Colquhoun*, 28 Tex., 140, a leading case on presumptions of the genuineness of Spanish titles.

John L. Henry, for intervenors Yongue and wife.—In support of the proposition that appellant was estopped by his affidavit and plea impeaching the *testimonio* as a forgery, he referred to the following authorities: *Portis v. Hill*, 30 Tex., 561; *Sprigg v. The Bank of Mount Pleasant*, 10 Pet., 264; *Bouv. Law Dict.*, title “ESTOPPEL IN PLEADING;” 4 Kent, 269, 8th ed.; 3 C. & H.’s Notes to Phillips’s Ev., part I, p. 366; 1 Greenl. Ev., secs. 22, 206, 210.

In support of the proposition that the *testimonio* could not have been read in evidence without proof of its existence, the following authorities were referred to: *Wood v. Welder*, 42 Tex., 408, and authorities there cited.

In support of the third proposition, that the *testimonio* could not be admitted or treated as evidence until the erasures and interlineations were explained, he referred to 1 Greenleaf on Evidence, 12th ed., p. 603, sec. 564.

Appellant himself charged, by solemn plea, under oath,

Argument for the intervenors.

which was never denied, that material alterations in the instrument were made, subsequent to its being signed, by filling blanks. This uncontested fact is fatal to the instrument. (*Park v. Glover*, 23 Tex., 472.)

If the testimonio was not in evidence, the court correctly refused to charge as if it was. (*Hampton v. Dean*, 4 Tex., 455; *McGreal v. Wilson*, 9 Tex., 428; *Lee v. Hamilton*, 12 Tex., 418; *Earle v. Thomas*, 14 Tex., 592; *Andrews v. Smithwick*, 20 Tex., 118; *Dodd v. Arnold*, 28 Tex., 101.)

The charge asked and refused by the court is peculiar in this respect: it charges that the effect of the testimonio "offered" in evidence was, &c. It does not refer to it as having been read in evidence, and, as the statement of facts fails to show that such a paper was read, we are justified in assuming that it was not, and that the court, after excluding it, was requested to give it the same effect as if admitted.

Again, this charge assumes that a testimonio was issued by the commissioner, Smythe, and instructs the jury, not to find whether the copies read to them are copies of it, but whether it was the same as some other paper "offered," but never read to them, and about which they could know nothing.

The record certainly indicates that, if the court erred at all, it was in not permitting the testimonio to be introduced in evidence; that error certainly could not be cured by his charging it in evidence.

In *Yarborough v. Tate*, 14 Tex., 483, *Earle v. Thomas*, 14 Tex., 583, a charge upon the effect of the testimonio, when it was not in evidence, we understand to be strongly reprobated. (*Hardy v. DeLeon*, 5 Tex., 211.)

Instructions must be referred to facts in evidence; and if they are correct in application to such facts, that is sufficient. (*Case v. Jennings*, 17 Tex., 661; *Norvell v. Oury*, 13 Tex., 32; *Thompson v. Shannon*, 9 Tex., 537; *Davis v. Loftin*, 6 Tex., 489, 500; *Hatch v. Garza*, 22 Tex., 187; *Scranton v. Tilley*, 16 Tex., 194.)

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If it was proper for the court in this case to have charged the jury at all upon the effect of the testimonio, and if it can be held that proof of its execution was addressed to the jury, and not to the judge, still the instrument itself should have been submitted to the jury in connection with the evidence of its execution, and no charge as to its effect would then have been correct, except in connection with a charge of what the law required to be proved to establish its execution. The jury, uninstructed, no more knew the law of proof of the execution of the instrument than they knew the law of any other fact.

We submit that, saying nothing of the impeaching affidavit of appellant, (and we don't see how it can be overlooked,) there can be no pretense that the execution of the testimonio was established by the evidence indicated to be necessary in the cases of *Beaty v. Whitaker*, 23 Tex., 526, 528; *DeLeon v. White*, 9 Tex., 600.

But treating the plea of defendant as an affidavit under the statute, what was its effect? Under its operation the plaintiff could have only had the benefit of the testimonio, by first proving its execution and genuineness and then reading it or introducing it in evidence. Certainly, when in the exigency of the case it became necessary for the defendant to use the instrument so attacked by him, there could not be any relaxation of the rule in favor of himself, by which his affidavit was less binding on him than on his adversary.

In *Edwards v. James*, 7 Tex., 373, the testimonio, it appears, had been duly recorded, while the one in this case had not. That had been filed under article 3716, Paschal's Dig. An affidavit under that section had been made impeaching it as a forgery. It was not allowed to be treated as evidence until not only the signature of the officer who executed and the persons who witnessed it had been proved, but the instrument itself thus proved had been introduced as evidence.

GOULD, ASSOCIATE JUSTICE.—In the opinion of Justice

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Walker, delivered on a former appeal of this cause, (*Ury v. Houston*, 36 Tex., 265,) will be found a sufficient statement of the original pleadings, showing that the plaintiffs, claiming an undivided interest in the Lovick P. Dikes headright league and labor of land, brought their suit to recover the same from alleged trespassers, and also to have partition with other joint owners. After the reversal of the case, George Bondies and Rosana Yongue, joined by her husband Samuel, intervened separately, claiming to be part owners of the land, and seeking to have their respective interests allotted to them in the partition. In an amended petition, the plaintiffs allege that plaintiff Nancy Houston is "the legal and equitable owner of an undivided interest of nineteen hundred and eight and a half acres" of the grant.

Affidavit was made by defendant, charging that the "pretended title, purporting to have been issued by George W. Smythe, special commissioner for the Government of Coahuila and Texas, to one Lovick P. Dikes, for one league and labor of land," was "fraudulent and void; that he believes and charges that the signature of said George W. Smythe, which appears to have been signed to said title as commissioner as aforesaid, is a forgery, and that the said title or testimonio was never signed by the said Smythe." Shortly after the filing of this affidavit, which appears to us simply an affidavit under the statute regulating the admission in evidence of recorded deeds, and not a plea of *non est factum*, (*Paschal's Dig.*, art. 3714,) plaintiffs filed interrogatories to J. M. Long, for the purpose of proving the signature of Smythe to a document then on file amongst the papers of the case, and purporting to be a testimonio of the Lovick P. Dikes grant. On the trial of the case, however, the plaintiffs relied on a certified translation of the protocol, from the General Land Office, and contended that the paper purporting to be a testimonio was a forgery; whilst the defendant maintained that it was genuine, and that it established the fact that the Lovick P. Dikes grant was issued on the 15th of November, 1835, two

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days after the closing of the land office, and that it was therefore illegal and void.

The land office translation of the protocol appears to have been introduced without objection, which showed the date of the application and of the order of survey to be September 15, 1835; the date of the field-notes and of the order that title issue to be November 11, 1835; and, finally, the date of the grant or title of possession to be as follows: "Given at the town of Nacogdoches, the —, A. D. 1835." The leading question on the trial undoubtedly was, as to the date of this grant, and, as bearing on that question, whether there was a genuine testimonio bearing date November 15, 1835, and in which the date of the protocol does not appear to be blank, but to be also November 15, 1835. The trial resulted in a verdict for the plaintiffs, ascertaining also the respective interests of the plaintiff and intervenors, and the judgment was that the plaintiffs recover the land of the defendant Blythe, and also that the land be partitioned between the plaintiffs and the other joint owners.

The case comes up on the appeal of defendant Blythe; and in order to present intelligibly the questions involved, it becomes necessary to state a considerable part of the evidence.

After introducing the certified translation of the protocol, the plaintiffs also read the deposition of E. M. Pease, to the effect that he was acquainted with the handwriting of George W. Smythe, and that he had examined what purported to be a title, written in the Spanish language, for one league and labor of land, in favor of Lovick P. Dikes, issued by Smythe, as commissioner of the State of Coahuila and Texas, which was then in the General Land Office of the State of Texas, at the city of Austin; that he found the signature of George W. Smythe, as commissioner, appeared three times to different parts of said title, each and all of which he believed to be in Smythe's handwriting, and genuine.

Plaintiffs also read the deposition of A. Manchaca, who

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testified that he was present in Smythe's office, at Nacogdoches, when he issued a grant of land to Lovick P. Dikes, but did not know for what amount. He did not know the date of said grant, nor that it was complete.

Both of these depositions were objected to, on the ground, substantially, that the title was not identified as the one in question, or as being for the land in controversy. These objections were properly overruled. It is to be remarked that these depositions were used, not for the purpose of proving up the execution of the protocol, for a certified translation of that was already in evidence; the evidence was probably taken to remove any suspicion as to the protocol, growing out of the blank date. It was pertinent and proper.

It was in evidence by the surveyor of Hopkins county that the Lovick P. Dikes league and labor was delineated on the official map of that county, marked thus: "Lovick P. Dikes, T., November 11, 1835," and that the survey had been respected as valid until within about two years of the trial. It was also in evidence that in 1836, Lovick P. Dikes lived in Nacogdoches county, Texas, was a married man, and, after conveying half his league and labor to J. M. Henry, died, leaving a wife and children. The plaintiffs deraigned title through conveyances connecting with the title of the widow, after her marriage to one Stoval, and two of the children.

The intervenors, Bondies and Yongue, each claimed under the conveyance to J. M. Henry.

The defendant Blythe read the deposition of David Whiting, Spanish translator in the General Land Office, giving a translation of an Exhibit A, attached to the interrogatories, purporting to be the testimonio of a grant to Lovick P. Dikes. This translation was read to the jury, and in it the date of the title and of the testimonio are both given as November 15, 1835. Defendant also read the deposition of J. M. Long, taken apparently in response to interrogatories propounded by plaintiff, interrogating him as to the genuineness of George W. Smythe's signature to an Exhibit D, purporting to be a

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Spanish testimonio of the Dikes grant, in reference to which he testified that he had known Smythe from about 1843, and knew his signature, and that he believed his signature to the testimonio to be genuine.

Defendant also introduced C. Payne, attorney for plaintiff, who testified "that the paper shown him, marked Exhibit D, and referred to in the answer of witness Long, is the paper that was attached by him to interrogatories propounded to witness Long; that it was returned with said interrogatories. Does not know how the paper got on file in this case."

It was in evidence that the distance from Nacogdoches to the land was about 160 or 180 miles.

In rebuttal, the plaintiffs read a portion of Blythe's affidavit, before alluded to, as to his belief that Smythe's signature to the title, or testimonio, was a forgery, and also read the deposition of A. Hotchkiss, taken at the instance of defendant Blythe, interrogating him as to the genuineness of Smythe's signature to the testimonio, which testimonio he is requested to attach to his answers, and which he testifies that he does attach to his answers. This witness testifies that he had known Smythe from 1833; was employed by him as clerk in his office as commissioner, and knew his handwriting well; that George W. Smythe uniformly spelled his name Smythe, and not as it appears in said testimonio, Smith; and that his signature to the testimonio is not genuine. He testifies, also, that the two last lines of the testimonio are in a different handwriting from the body of the instrument. This witness also gives a translation of the testimonio, which was read to the jury by the plaintiff, and which differs from that given by Whiting, in that the date of the title is (perhaps by mistake in copying) November 9th, 1835, and the testimonio is without date.

At the request of plaintiffs, the court instructed the jury that, "should you believe that said protocol is without date, in the absence of evidence to the contrary, the law raises the presumption that it was issued on or before the 13th day of

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November, 1835, and that it is a valid grant, and it devolves upon the defendant to refute said presumption in favor of the validity of the grant, by showing, by proof, that said grant was not made until after the 13th November, 1835; and if you believe that the paper in Spanish, purporting to be the testimonio issued by George W. Smythe, is not a genuine copy of the protocol, or if you believe that it was not executed by said George W. Smythe, but that it is a forgery, then it should not be considered by you for any purpose, and does not tend to prove any fact, although the plaintiffs in this cause may at one time have believed and treated it as genuine, and may at one time have attempted to prove and use it as a muniment of their title." The jury are also instructed, at the request of the plaintiff, "that after the lapse of thirty-five years, when the land has passed into the hands of innocent purchasers," the presumption of the legality of the acts of the officer is greatly increased, and that "their illegality must be shown by full and satisfactory proof." The defendant asked, and the court refused to give, an instruction concluding as follows: "If you are satisfied from the evidence that this testimonio, offered in evidence, is the same issued by the commissioner and delivered to Lovick P. Dikes as the evidence of his title, and you shall also believe from the evidence that said testimonio was issued on the 15th day of November, 1835, and you further believe that the title under which plaintiffs claim is without date as to the day of the month, you will find for defendant Blythe."

There was a motion for new trial, alleging, amongst other grounds, that the charge of the court "entirely took from the jury the consideration of the evidence, offered by defendant Blythe, of the time when the grant was made by George W. Smythe to Lovick P. Dikes, and was indirectly a charge on the weight of evidence." One of the errors assigned is, that the "court erred in overruling the motion for new trial, for the reasons set forth in the motion, to which reference is made;" and another assignment is to the action of the court

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in refusing the instruction just quoted. These assignments are sufficient to require us to consider whether the charge as given was objectionable on the ground stated, and whether the charge asked was properly refused.

The charge must be considered with reference to the fact that the translation of the protocol was in evidence, apparently without objection, and further, that if the genuineness of the protocol was questioned, there was evidence tending to show that it was in fact issued by the commissioner George W. Smythe. Under these circumstances, we do not think that the suspicion which might grow out of the irregularity of the protocol, in its date, would prevent the operation of the presumption that the commissioner who issued it "acted in all respects in conformity to law." (*Jenkins v. Chambers*, 9 Tex., 167; *Goode v. M'Queen's Heirs*, 3 Tex., 258.)

If there was no evidence of its actual date, the law would presume that the commissioner acted at a time when he might legally do so, and that the true date was prior to the closing of the land office; and if there was evidence as to the true date, it was properly required to be sufficient to overcome this presumption. To this extent the charge seems to us to state the law correctly.

Nor do we find any error of law in the proposition, that after the lapse of thirty-five years, and in favor of innocent purchasers, the evidence required to rebut this presumption must be full and satisfactory. There would seem to be a sound public policy in discouraging attacks on grants which have long been acquiesced in and which have passed into the hands of innocent third parties, and in requiring that, when they are sought to be impeached by parol evidence, the evidence shall be of a satisfactory character. The opinion of Justice Wheeler, in the case of *Johnston v. Smith*, 21 Tex., 722, and of Justice Smith, in *Howard v. Colquhoun*, 28 Tex., 135, tends strongly to support the proposition that, in favor of innocent purchasers, the presumption of the regularity and validity of a grant, will be so strengthened by acquiescence

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and the lapse of time, as to stand until rebutted by satisfactory evidence.

But if the proposition be conceded to be correct, it by no means follows that it was proper to give it in charge in a case where the evidence, if there was any, of the date of the grant, consisted in a duplicated original of the grant itself, which was in fact, when established, as satisfactory evidence of the true date as if it had been given in the protocol. That the testimonio is a second original, and may be used to supply the defects of the protocol, is the established doctrine in this court. (*Titus v. Kimbro*, 8 Tex., 210; *Chambers v. Fisk*, 22 Tex., 535; *Smith v. Townsend*, Dallam, 572; 7 Tex., 332.) It follows that, if there was before the jury a genuine testimonio of the Dikes grant, it was the duty of the court, when requested to do so, to instruct the jury that the date given in the testimonio was to be taken as the true date, unless there was evidence to the contrary. If the true construction of the charge asked by defendant be, that the date of the issuance of the testimonio (without reference to the correspondence of that date with the date of the protocol, as recited in the testimonio) was the date with which the blank in the protocol was to be supplied, we are of the opinion that it was still a correct charge, unless there was evidence tending to show that the testimonio was issued on a subsequent day. We see no such evidence in the record. The issuance of the protocol and of the testimonio were properly and ordinarily contemporaneous acts. (*Herndon v. Casiano*, 7 Tex., 332.) If there was evidence entitling defendant to have the existence and date of a genuine testimonio passed upon by the jury, it was error in the court to refuse the instruction.

It is contended that the record does not show that any testimonio was read to the jury; and in truth the statement of facts does not show that the Spanish document, purporting to be a testimonio, was ever read in evidence, though Payne's testimony does show that it was produced and exhibited to

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him on the trial. Two translations of that instrument, however, were read in evidence, and one of those was introduced by the plaintiffs. The record abundantly shows that what purported to be the testimonio was on file amongst the papers. Hotchkiss testifies that it is appended to his answers, marked Exhibit A; and there seems to be authority for holding that an exhibit so attached may be regarded as in evidence, although not read to the jury. (*Pridgen v. Hill*, 12 Tex., 374.) The plaintiffs themselves asked, and the court gave, an instruction to the jury as to their course, if they believed "the paper in Spanish, purporting to be the testimonio issued by George W. Smythe," not to be a genuine copy of the protocol. Under all these circumstances, we conclude that the purported testimonio was so far in evidence; and the evidence as to its genuineness was so far conflicting, as to require the court, when requested to do so, to submit to the jury a charge based on the hypothesis of its genuineness. Under this view of the evidence, the charge of the court as given was objectionable, and the refusal of the charge asked was erroneous, and requires a reversal of the cause.

There are other questions in the case on which it is proper that we should pass.

The defendant offered the deposition of one Brown, who testified that some years before he held the office of translator (Spanish) in the General Land Office; that he spoke and wrote the Spanish language; and he attached to his answers a translation of the purported testimonio, certified by him to be correct. The objection taken and sustained to these depositions and this translation was, that his depositions did not show that he was a Spanish scholar, and competent to correctly translate the Spanish language into the English language. We think that Brown's depositions sufficiently showed his competency as a translator, and that the objection taken should have been overruled. As the case is to be reversed on other grounds, it is unnecessary to say whether this was a material error or not.

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The plaintiffs, in making out their title, offered in evidence a certified copy from the county records of a deed from Stoval and wife to J. H. Sparks and C. D. McKnight, which was objected to, on the ground that the certificate of acknowledgment did not show of what county the officer giving the certificate was notary public, nor that he was a notary public at the time said acknowledgment was taken. The certificate commences: "The State of Texas, county of Hopkins," recites the appearance of the parties before the "undersigned authority," and winds up: "Witness my hand and official seal, at Douglass, this 6th day of October, A. D. 1854. (Signed,) John R. Clute, Notary Public, N. C."

This objection was, we think, properly overruled. The case of *McDonald v. Morgan*, 27 Tex., 504, is nearly in point as to the sufficiency of the signature, which, it must be assumed, was authenticated with the official seal of the notary, showing the words "Notary Public, County of ———, Texas." (Paschal's Dig., art. 4692.) The discrepancy between the county named in the outset and the letters designating his county appended to the signature might easily be accounted for, and certainly was not of sufficient importance to invalidate the record.

In reversing the case, attention is called to the averments of the last amended petition, alleging the title to be in Nancy Houston, whilst the evidence as to most, if not all, of the land claimed by plaintiffs shows it to be community property.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

A. HARRIS & FOX v. A. & L. FINBERG.

1. **LIABILITY OF WIFE ON NOTE MADE BY HER.**—The name of the wife being found on a promissory note conjointly with that of her husband, does not raise a legal presumption that she is, either jointly or severally, liable on it.

Argument for the appellants.

2. **DAMAGES ON SEQUESTRATION—EVIDENCE.**—It is error to admit evidence of damage resulting from the depreciation in the market price of goods seized under writ of sequestration, in the absence of any allegation in the pleadings that such special damage had been sustained; being an uncertain and not necessarily a natural or legal consequence of the seizure and detention, such damage must be specially pleaded.
3. **CASES DISCUSSED.**—Haldeman v. Chambers, 19 Tex., 52; Clardy v. Callicoate, 24 Tex., 173; Portier v. Fernandez, 35 Tex., 535; Seiling v. Gunderman, 35 Tex., 545; Stetson v. Le Blanc, 6 La., O. S., 270; Littlejohn v. Wilcox, 2 La. Ann., 620; 21 Ala., N. S., 496; 8 B. Monr., 51-160; Kirksey v. Jones, 7 Ala., 622.
4. **SEQUESTRATION—BURDEN OF PROOF.**—The fact that a plaintiff, who has caused goods to be seized under a writ of sequestration, has established his debt and the validity of a written lien, by which he was authorized to take possession of and sell the mortgaged goods in the event his debt was not paid, does not preclude the defendant from showing that the suing out of the writ was wrongful, by negating, on the trial, the truth of the grounds on which it was issued; but it is incumbent on the defendant to make out by evidence a *prima facie* case that the suing out of the writ was wrongful, before the plaintiff can be required to disprove it.
5. **SEQUESTRATION—MEASURE OF DAMAGES.**—Where the suing out and levy of a writ of sequestration is malicious, exemplary damages may be awarded; where it is merely wrongful, without malice, actual damages only can be allowed; but in no case can the value of the defendant's time, while attending court, or any such incidental expense, be allowed as a proper element of actual damage. The establishment of any other rule would open a wide door for the admission of other expenses and losses incidental to the prosecution of rights in courts of justice, and would inaugurate a radical departure from the principles of the common law.

APPEAL from Anderson. Tried below before the Hon. M. D. Ector.

A statement of the complicated pleadings and numerous exceptions which marked the progress of this cause in the lower court will subserve no useful purpose. Everything necessary to a proper understanding of the opinion will be found referred to in it.

Reagan, Greenwood & Gooch, for appellants, in support of their position, that appellee could not introduce evidence of

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the depreciation in the value of the goods after the levy of the writ for recovery of damages without plea to support the evidence, cited *Armstrong v. Percy*, 5 Wend., 535, to 538; *Sedgwick on Dam.*, 764, 765, 768; *Chitty on Pleading*, vol. 1, 428; *Sedgwick*, (with reference to pleading and practice,) chap. XXIV, 574; also *Mims v. Mitchell*, 1 Tex., 443; *Coles v. Kelsey*, 2 Tex., 541; *Hall v. Jackson*, 3 Tex., 309, to 311; *Towner v. Sayre*, 4 Tex., 28, 29; *Young v. Lewis*, 9 Tex., 77; *Roseborough v. Gorman*, 6 Tex., 314. They also argued at length the proposition that the defendant below could not recover for his time spent in protecting his interest in court as an element of actual damage.

T. T. Gammage, for appellees, insisted that the evidence warranted the verdict in defendant's favor for the amount rendered, even after discarding from the estimate the item of depreciation in the value of the goods.

The owner of property seized under an attachment wrongfully sued out, is entitled to recover as damages the value of the use of his property while it is withheld from his control.

In the acts of the plaintiffs in suing out the writ consist the damages, and the plaintiffs are liable. (*Punchard v. Taylor*, 23 Tex., 424.)

The motion for new trial in this case should have been, and was, properly overruled. (3 Gr. & Wat. on New Trials, secs. 1144, 1145, 1146; *McGehee v. Shafer*, 9 Tex., 20; *Cole v. Tucker*, 6 Tex., 266; *Barnette v. Hicks*, 6 Tex., 352.)

In the case at bar the plaintiffs have taken quite a number of bills of exceptions, and assigned lengthy assignment of errors, but I conceive there is but one question in the whole case: was the writ of sequestration wrongfully sued out? The testimony answers the question in the affirmative; the jury answered the question in the affirmative; and the presiding judge, in overruling the motion for new trial, answered the question in the affirmative. I respectfully ask that the judgment be affirmed.

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ROBERTS, CHIEF JUSTICE.—Appellants, who were plaintiffs below, brought suit against appellees on three notes, payable at the office of M. Ash, in Palestine, Texas, amounting to \$1,438.20, two of which were due, and the other, falling due during the pendency of the suit, was also declared on. They also sought to foreclose a mortgage, executed by defendants 16th of August, 1873, upon a stock of goods that had been given to them by defendants to secure the punctual payment of said notes as they fell due, in which it was stipulated that “said Harris & Fox, or their agent, Michael Ash, are authorized and hereby empowered to take possession of said stock of goods, or so much thereof as may be necessary, and sell the same at private sale, or to sell the same at public auction, at discretion, first giving notice, if a public sale, in the ‘Trinity Advocate,’ for ten days, of the time and place of sale of said goods;” the proceeds thereof to pay the necessary expenses, “and the residue to be applied to the payment of said debts as they become due.” The stock of goods was estimated in said mortgage to be of the value of six thousand dollars, and the debt which it was given to secure was therein stated to be fifteen hundred dollars.

Plaintiffs sued out a writ of sequestration, upon the ground that they feared that the defendants would “waste and remove from Anderson county their stock in trade now in their possession,” the affidavit for which was made by Henry Fox, one of the firm, for Harris & Fox, and which writ of sequestration was levied upon the stock of goods as the property of defendants, A. & L. Finberg, an inventory of which goods was made, with a valuation amounting to \$4,317.41, by the sheriff, constituting a part of his return. The petition was filed the 22d day of January, 1874, and the writ was issued and levied on the 24th day of the same month.

Plaintiffs alleged that on the 21st of January, 1874, at Palestine, Texas, Henry Fox and M. Ash demanded of defendants payment of the notes due, and the possession of said stock of goods, both of which were refused.

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The exhibits, made part of this petition, showed that L. Finberg was the wife of A. Finberg. If exceptions had been sustained to it, so far as it claimed a judgment against her on the notes, because there were no facts stated showing her liability on them, it might have simplified the subsequent proceedings, by requiring the plaintiffs to state such facts or abandon their said claim as against her; for a wife's name being found on a note conjointly with that of her husband, does not raise a legal presumption that she is either jointly or severally liable upon it. To remedy this defect, it was afterwards stated in the pleading of plaintiffs that the goods for which these notes were given were purchased for the benefit of her separate property. This was after she had pleaded her coverture, and that the stock of goods levied on was her separate property, and also in reconvention for damages for the wrongful and malicious suing out and levying of the writ of sequestration upon her stock of goods. All of the questions arising upon the claim made against her in the petition and upon her pleas are immaterial in the consideration of this case, from the fact that there was no verdict and judgment either for or against her.

So the pleas of A. Finberg, that the mortgage was procured by fraud and moral duress, and in reconvention for damages for the malicious suing out and levy of the writ of sequestration, present no material question, because the finding of the jury excludes their consideration as the case is now presented here.

Under the pleadings, evidence, and charge of the court, the jury returned a verdict in favor of the plaintiffs against A. Finberg, on the notes, for the sum of \$1,491.21, and a mortgage lien upon the stock of goods levied on, and the same to be the community property of A. Finberg; and in favor of A. Finberg against the plaintiffs, for the sum of \$2,620, as actual damages for the wrongful suing out of the writ of sequestration; upon which a judgment was rendered for A. Finberg against the plaintiffs, for the sum of \$1,128, the dif-

ference between said amounts, as damages aforesaid, and for a return to A. Finberg of the goods levied on.

As the plaintiffs, in appealing from this judgment, have not complained of the finding of the jury upon the notes and mortgage, nor of the jury not having found in their favor against Mrs. L. Finberg, the questions for our consideration are narrowed down to the errors in the judgment in favor of A. Finberg (substantially for the sum of \$2,620) for damages for the wrongful suing out of the writ of sequestration. Upon this verdict coming in, the plaintiffs moved the court for a judgment, notwithstanding the finding in favor of A. Finberg in his cross-action for damages. This presented the question, whether or not the suing out of the writ of sequestration could be wrongful if, as shown by the verdict, the plaintiffs had established their debt and mortgage lien upon the goods levied on. The court overruled this motion, which is assigned as error. Another assignment of error is to the charge of the court upon the measure of actual damages applicable to a case of the wrongful suing out of the writ of sequestration, as follows, to wit:

“If the testimony in this case authorizes it, the following would be proper rules for measuring this actual damage, the goods not having been replevied:

“1. Legal interest, eight per centum per annum, upon the value of the stock of goods levied upon and held up by the sequestration from date of levy to this date, which was from 24th January, 1874, to the 19th of August, 1875.

“2. The damage, if any, in the value of the same, by means of age or otherwise, from having been held up by the levy.

“3. If not included as laid down in rule 2, then the depreciation, if any, in the fair market value of the goods held up and levied upon by said writ of sequestration, as compared with the fair market price at the date of said levy.

“4. If any of said goods were shown to have been sold by order of the court as perishable property, at less than the fair

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market price, then the difference, if any, between this fair market price and the sale price.

“5. You may include, also, in making up your verdict for actual damage, if any, the value of the time of defendant, A. Finberg, in attendance upon the court in this case.”

Counsel for plaintiffs make no objection to the first and second ground of actual damage, being for interest on the value of the goods, and the deterioration in quality or damage resulting from age by being kept over, the first being a legal consequence, and the second being a proper subject of special damage, and being alleged and claimed in the answer of A. Finberg. (*Wallace & Co. v. A. & L. Finberg*, decided at this term.)

The objection to the 3d ground of damage in this charge for the depreciation in the market price is, not that it might not have been a good ground of special damage, but that it was not alleged in the answer, and on that account the evidence offered to prove it was objected to, as appears in a bill of exceptions in the record. After the most diligent search, no such allegation has been found in the answers of A. Finberg; and without it being alleged as a ground of special damage, there could be legally no recovery for it. The property seized and detained, being goods for sale by retail, would be likely to deteriorate by age, by being held over for a year, though they might not for a week or a day; or property seized might be such as would not deteriorate at all, as might be the case with land or other property. Being, therefore, a ground of damage, uncertain, and not necessarily a natural or legal consequence of the seizure and detention, it must be alleged as a ground of special damage to justify a recovery. The depreciation in the market value of such articles is a more uncertain fact, and therefore the more necessary to be alleged as a ground of special damage. (*Wallace & Co. v. A. & L. Finberg*, decided at this term.)

As to the 4th ground in the charge, having reference to the allowance of the difference in the price for which a portion

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of the goods sold below their valuation by the sheriff, the evidence on that subject was objected to, as appears by a bill of exceptions. A. Finberg alleged in his answer that they did not sell for half of their value. The ground of objection to the evidence by the plaintiffs was, that they were ordered to be sold in the suit of Wallace & Co. v. A. & L. Finberg, in which an attachment was levied on the same goods by the sheriff. It appears that a part of the goods was ordered to be sold, as perishable property, at the instance of the sheriff, which proceeding was in the case of Wallace & Co. v. A. & L. Finberg, by the evidence before the jury in this case. After the sale on the 14th May, 1874, the sheriff returned a sale of goods amounting to \$879.18, and after deducting expenses on said property (\$206.88) there was left \$672.30, which, by order of court, was deposited with the District Clerk, to abide the decision of the court in that cause. It does not appear by any pleading or evidence in this case why said goods were sold by an order in the case of Wallace & Co. v. A. & L. Finberg. They were levied on by the sheriff, under the writ of sequestration, as appears by his return on it in this case. It does not appear that they were ever relieved from said levy, and it is not perceived why defendant should prove, as an element of damage, that they brought twenty per cent. less than they were appraised at when levied on, as he did, by the sheriff. We have no means of ascertaining the pertinency of such evidence in this case.

The 5th ground of error in the charge was, in allowing A. Finberg compensation for the value of his time in attending court in this case. A. Finberg alleged that he had attended court in this case over one hundred days, and that his time so spent was worth five dollars per day, which he proved, on the trial, by his own evidence. Plaintiffs objected to this evidence, as not relating to a proper subject of actual damage, which appears in a bill of exceptions, and its admission, as well as the charge relating to it, is assigned as error.

This question, then, the allowance to a party litigant com-

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pensation for his time in attending court, and that first referred to, the right of the defendant to recover damages for the wrongful suing out of a writ of sequestration, in a case where the debt and lien on the goods levied on are established, remain to be considered.

First, as to the right of defendant to recover damages. But little light has been thrown upon the subject by decisions in our Supreme Court in cases of seizure by a writ of sequestration, and none in cases where a lien in the nature of a mortgage, with power to take possession and sell the goods, is given.

The case of *Haldeman v. Chambers* was one in which a writ of sequestration was sued out and levied on land in a suit for specific performance upon a title bond, and in which defendant claimed damages in reconvention for the unjust, vexatious, and oppressive use of the writ. No damage was allowed, and defendant complained of it to the court, on appeal. This would seem to be a suit for a malicious prosecution of the suit and issuing of the writ of sequestration, rather than for the wrongful suing out of the writ. There were a number of important questions in the case upon which more attention was bestowed than upon this. Justice Wheeler, in delivering the opinion, says: "Without deeming it necessary to determine whether the case presented in the answer was such as would entitle him to maintain an action for damages, we are of opinion that the court did not err in declining the award. It may be a question whether, in consenting to waive a jury, the defendant is not to be deemed to have waived his right to claim a judgment for unliquidated damages." Upon a rehearing, the same learned judge, in an elaborate discussion of the subject of the malicious suits wherein damages have been allowed, concludes, in substance, that plaintiff acted in good faith, and not upon malice, in bringing the suit, and that defendant had suffered no injury by the suing out of the writ, he having been "subjected to no inconvenience in giving the required bond and security." (*Haldeman v. Chambers*, 19 Tex., 52.)

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That was evidently not a case similar to this, as we are now considering it. In the case of *Clardy v. Callicoate* there was a reconvention for damages when a writ of sequestration was sued out, but the only question decided was, that the opinion of a witness, as to the amount of damage done by it, was inadmissible. (24 Tex., 173.) So in the case of *Portier v. Fernandez*, the only question was the dismissal of parties not necessary to be joined as defendants. (35 Tex., 535; see also *Seiling v. Gunderman*, *ib.*, 545.) The only significance of these cases in connection with this case is, that there has been no question raised disputing the right of the defendant to reconvene for damages when a writ of sequestration is sued out as well as when a writ of attachment is sued out.

In Louisiana a defendant, in a suit brought against him to recover personal property, in which a writ of sequestration was sued out and levied, in which plaintiff failed to establish his right to the property sued for, was allowed to bring an action to recover damages for the wrongful suing out of the writ of sequestration. (*Stetson v. Le Blanc*, 6 (O. S.) La., 270.) In that State, as in this, a writ of sequestration may be sued out in foreclosing a mortgage. (*Bres v. Booth*, 1 La. Ann. R., 307.) None of these cases in either State, and none that have been found, are similar to this, where there is a suit to foreclose a mortgage lien in which there is a power to take possession and sell the goods to satisfy the debt and expenses.

Counsel for plaintiffs contend that, as they had a right to take possession of the stock of goods and sell them, it cannot be held to be wrongful to use the process of the court so as to require the sheriff to do the same thing for them. This is stating a case plausibly, but it may not be exactly their case, and all of it.

By the terms of the instrument it was evidently intended that the defendants should remain in possession of the goods, and continue to sell them in the regular course of trade as merchants until default of payment, as the notes become due.

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which we may presume from the amount of goods and size of the debt, in installments, was hardly expected by the contracting parties to happen. It was designed as a lien, a preferred security for a debt resting on the stock of goods in the course of trade.

It could not have been contemplated that the plaintiffs, upon default of payment, would take possession of the stock of goods by force of arms, if defendants refused to deliver the goods or enough of them to satisfy the debt by their sale according to their implied contract. The plaintiffs could not make a complete valid sale of the goods, either privately or publicly, without first getting possession of them, so as to deliver them to the purchaser or purchasers. Leaving the goods in the possession of the defendants, to be dealt with in the ordinary course of trade, entailed on the plaintiffs the necessity of resorting to a suit in court for a recovery of the possession of the goods, or for the foreclosure of the lien. The power to take possession, as provided for in the contract, without suit, was subject to the condition of delivery on the part of defendants. That failing, the power fell, as though it had not been, and that was the legal consequence of terms of the contract itself, in leaving the defendants in possession of the goods, dealing with them as their own. If, on the other hand, the plaintiffs brought their suit to foreclose the lien, without first having demanded the goods for the purpose of executing their power personally, as it has been held by this court they may do, (*Morrison v. Bean*, 15 Tex., 269,) they thereby waived any benefit under it, and must proceed as though no such power had been conferred.

In either event, then, the power to take possession of and sell the goods to pay the debt can confer no greater right and furnish no greater protection to the plaintiffs in this suit than if it had been left out of the instrument.

Treating it, then, as an ordinary mortgage lien, our State provides for issuing a writ of sequestration to seize mortgaged property, upon the affidavit of the party applying for the

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same, that he fears the defendant will waste the property or remove it out of the county, and giving a bond with sureties in double the value of the property sequestered, conditioned to pay the defendant all such damages as may be awarded against him in case it shall be decided that such sequestration shall be wrongfully sued out. (Paschal's Dig., arts. 5095a, sec. 1, and 5096.) This is similar, though not exactly the same in terms, to the affidavit and bond in original attachments. (Paschal's Dig., arts. 142, 163.)

We may regard writs of sequestration and of attachment as standing on a similar footing, in regard to the rights of the defendants to recover damages for the wrongful suing out of them in this State, when used as auxiliary writs under the statute to seize and secure property, at least sufficiently so, to authorize us to look to the precedents in attachment cases. The fact, then, that the plaintiffs in this case have established their debt and the validity of their lien upon the goods sequestered, does not preclude the defendants from establishing that the suing out of the writ was wrongful, by negating on the trial the truth of the ground upon which it was issued, as required in the affidavit, which was, that the party applying for it feared that the defendants would waste and remove out of the county the property mortgaged. This the court required the defendant to do. And it was certainly incumbent on the defendant to make out a *prima facie* case by evidence before the plaintiffs were required to disprove it. (*Offut v. Edwards*, 9 Rob. (La.) Rep., 94.)

The next question: Was there error in the charge of the court upon the 5th ground, in instructing the jury that they might allow, as actual damages to the defendant, A. Finberg, the value of his time while he was attending court in this case? This would surely be a very uncertain measure of damages to be imposed upon the plaintiff. One man's time might be worth ten times as much as that of another; and if the value of his time should be given, equally, it would seem,

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might his expenses of board and lodging, which would be different with different persons, in different places; so, too, his counsel fees would be equally as necessary an expense. Usually, in litigated cases, it is necessary and proper that a party should attend court, and also employ counsel to attend to his case; and he must generally sustain the loss of much valuable time and incur personal expenses, as well as pay his counsel fees. They are all losses of the same kind, incidental, and often onerous when the litigation is protracted. The allowance of this kind of loss would certainly produce great inequality in the amounts given for the same wrongful injury inflicted in different cases of the same character, dependent not upon the case itself so much as upon the parties concerned in it, and the locality where the suit was brought. It is unequal in another respect, as between the parties litigant. For suppose that, after a protracted and expensive litigation, it is established that the issuing of the writ was not wrongful, and the plaintiff fully maintains his action in every respect: he gets no compensation for his time and expenses beyond the costs of suit, however much they have been, or however groundless the cause of action on the part of the defendant, whose unjust effort to obtain damages has mainly caused them to be incurred.

Mr. Drake, in enumerating the grounds of actual damage in such suits, includes "expense and losses incurred by the party in making his defense to the attachment proceeding." Under this head he specifies expenses incurred in obtaining testimony on a trial (where such is by law authorized) of the truth of the affidavit on which the attachment was issued, costs of suit to which defendant has been subjected, and fees paid to counsel in the attachment suit, but not fees to counsel for services in the action for damages. And he adds, "Where the attachment is not the original process, but is in aid of or auxiliary to an action instituted by ordinary process, no costs connected with the suit, in aid of which the attachment is obtained, can be recovered." (Drake on Attach.,

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secs. 175-176.) He does not mention the value of a party's time in attending court in the case. If he had, this case is relieved by the conditions or qualifications which are annexed to his propositions; because in this State the facts stated in the affidavit for attachment are not allowed to be controverted for the purpose of dismissing the writ, as it is done in Louisiana. (*Van Winckle v. Flecheaux*, 12 La., (O. S.), 148.)

An original attachment, as well as sequestration, is an auxiliary process here, and the latter has never been used in this State as a means of bringing a party into court by and through his property seized, as has been the case with the writ of attachment in some States. Justice Chilton says, on this subject, "the costs in defending the suit in which the ancillary attachment was sued out, the plaintiff in that suit having failed, has no connection with the attachment;" and gives as a reason that its object was only to fix a lien upon property—the facts in the affidavit could not be contested, and therefore no cost could be incurred by the defendant in that suit in disproving them. (*White v. Wiley*, 17 Ala., 169.) Furthermore, the reconvention for damages, or cross-action of defendant in this case, stands in the place of the action for damages, in which it is said, by Mr. Drake, counsel fees cannot be allowed. (*Offut v. Edwards*, 9 Rob., (La.), 90.)

These rules of Mr. Drake are not the result of a deduction from principle, as applicable to the measure of actual damages, but they are an announcement of what has been said or decided in a number of cases, to which he refers, being, perhaps, the most favorable to a liberal allowance of actual damages of any that can be found, if, indeed, they can be regarded as decisions under that head. The leading case upon which he bases his rules for actual damage is the one last cited from Louisiana, where the civil law prevails. In that case the ground of action for the recovery of damages, as alleged, was the "vexatious and oppressive" proceedings of the plaintiff in the suing out and levy of an attachment

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upon the property of defendant in a previous suit. "No exception was made to the demand in reconvention." The sum of five hundred dollars was given as damages. The Supreme Court, in reversing the case, upon the sole ground of excess in the damages awarded, in explanation of the reasons for doing it, say: "About sixty barrels of corn are said to have been destroyed, worth fifty cents per barrel. [Flour barrel of corn in the shuck is, perhaps, meant.] Not more than four of the slaves seized could render any service. They were detained about twelve days, and the highest estimate set upon their services is ten dollars per month. The defendant was obliged to come twice to the court house, a distance of about twenty-five miles from his residence, to get his slaves released, and had to give security. For his losses and trouble he should be liberally remunerated. He would also, probably, be entitled to recover what he may have paid for professional services of counsel engaged to aid him in dissolving the attachment, (which could be done upon proof of facts negating the ground for suing out the attachment;) but in estimating them, the jury should not take into consideration the services of counsel in prosecuting the claim for damages, which, we think, was probably done in this case."

Further on it is added, that, "in this case we are unable to discover any malicious motive in the plaintiff. He hastily resorted to a harsh but legal remedy, without sufficient cause, and he should pay for it; but in assessing the damages, the jury should be careful not to have made him a victim of one of the parties in their efforts to rescue and indemnify the other." In that case, there was no reference to the attachment bond as a ground of suit, and it was evidently a suit for the malicious suing out and levying of an attachment, in which exemplary damages might have been recovered, and not a suit for the wrongful suing out of an attachment, in which actual damages alone could be awarded.

In another case, cited from the same State, a suit was brought, and an attachment was sued out, and afterwards

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abandoned. It was brought, as the plaintiff said, to try a question.

The defendant afterwards brought a suit on the attachment bond, and the Supreme Court held that counsel fees should have been allowed, which were paid for defense against the attachment, but say nothing about the value of the time, or expenses otherwise of the defendant in the attachment. It is obvious that this decision was made without reference to any particular distinction between the malicious and the wrongful suing out of the attachment. In the opinion it is said, "suitors who try experiments, without hope of success, and who do not prosecute them, must take the consequences. They cannot be considered in good faith, and the rule of damages applicable to them is peculiar." What made the peculiar rule applicable to the case was the want of good faith—a suit by attachment without probable cause, which is one of the elements of a malicious prosecution. (*Littlejohn v. Wilcox*, 2 La. Ann. Rep., 620.)

In a case in Alabama, which is cited by Drake, a suit was brought for the wrongful suing out of an attachment. The Supreme Court, after determining to reverse and remand the case on another point, said, in reference to another trial: "In *Marshall v. Betner*, 17 Ala., 832, we held that when malice is the gist of the action, and vindictive damages recoverable, counsel fees reasonably and necessarily incurred might be proved and considered by the jury in the assessment of damages; but we see no just or sound reason why the consideration of these expenses, in the estimation of damages by the jury, should be confined to cases of malice." The opinion proceeds to reason to this conclusion by the analogy of a physician's bill, incurred by the injured party, being allowed as damages against a wrongdoer. (21 Ala. (N. S.) Rep., 496.) In none of these cases are there any precedents cited as having previously established the rule announced.

We regard these as extreme cases, not in harmony with the common law, which prevails in this State, as applicable

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to an action for the wrongful suing out of an attachment or sequestration.

In States where the suit for damages and that in which the attachment is sued out are separate suits, and not joined, as they may be in this State, it is generally held that the costs incurred by the defendant, on account of the wrongful attachment, may be recovered by him in the damage suit. (*Dunning v. Humphrey*, 24 Wend., 30.) This has reference to the costs of court. As the writs of sequestration and of original attachment are auxiliary processes only, and there can be no contest as to the grounds of the attachment or sequestration except by motion to dismiss it, the costs incurred on account of the issuing of the writ would usually not amount to much; and in cases of reconvention for damages in this State, the attachment or sequestration suit, and the reconvention for damages, both being usually in the same suit, no notice has been taken of this as an item of damage.

Apart from the cost, the proper rule for the measure of damages for the wrongful suing out of the writ is laid down by the Supreme Court of Kentucky, as follows: "The inquiry in regard to the injury which the party may sustain by the deprivation of the use of his property should be limited to the actual value of the use; as, for example, the rent of real estate, the hire or services of slaves, or the value of the use of any other species of property in itself productive. The property in this case was not of that character, and the injury from being deprived of its use should be restricted to the interest on the value thereof. If, however, the property is damaged, or if, when returned, it should be of less value than when seized, in consequence of a depreciation of price, or from any other cause, for such difference the plaintiff would be entitled to recover. For any injury beyond that, the damages would be conjectural, indefinite, and uncertain, and the plaintiff cannot recover in this action. But this rule, as to the depreciation of the price, would not be applicable to every species of property. It would, however, apply in this

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case, as it was the trade and business of the party to vend the goods attached, and not to keep them for mere use." (8 B. Monr., 51; *Heath v. Lent*, 1 Cal., 411.)

This has been quoted at length, to show that it excludes any such ground of damage as that now under consideration.

A number of suits of similar character have been before the Supreme Court of this State, and, in deciding them, the court has repeatedly announced, that where the suing out and levy of the writ is malicious, exemplary damages could be awarded, and where it was only wrongful, without malice, actual damages only could be awarded. In none of them has it been defined what losses and expenses are embraced under the head of actual damage, nor the exact limitations of what may be allowed as such. But it is believed, that in none of them has the value of the defendant's time, while attending court in the case, or any such incidental expense, been allowed or sanctioned as a proper element of actual damages. (*Walcott v. Hendrick*, 6 Tex., 406; *Peiser v. Cushman*, 13 Tex., 390; *Wiley v. Traiwick*, 14 Tex., 662; *Castro v. Whitlock*, 15 Tex., 437; *Haldeman v. Chambers*, 19 Tex., 52; *Reed v. Samuels*, 22 Tex., 114; *Punchard v. Taylor*, 23 Tex., 424; *Clark v. Wilcox*, 31 Tex., 331; *Clardy v. Callicoate*, 24 Tex., 173; *Portier v. Fernandez*, 35 Tex., 535.)

More than usual attention has been given in this opinion to this point, because, if the pay be allowed a party for his time in attending court, it opens a wide door for the admission of other expenses and losses incidental to the prosecution of rights in courts of justice, and will inaugurate a radical departure from the principles of the common law. It is a principle that pervades the whole system of English jurisprudence, that the laws are to be enforced by the aid of the people, as jurors, witnesses, and parties in court asserting their rights, to be performed as a public duty, and the law does not undertake to compensate for all losses and expenses incurred in the performance of such public duty. Under

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this principle, each litigant paid his own costs of court originally, and this was changed by statutes giving costs in certain actions, until it became general. Criminal actions, even, would rarely be prosecuted, unless some one came forward and assumed the responsibility of being a prosecutor in the case, generally without compensation in any event.

Originally, also, no damages could be recovered against a party for bringing a civil action, however unfounded. Lord Camden said: "There are no cases in the old books of actions for suing, where the plaintiff had no cause of action. But of late years, when a man is maliciously held to bail, where nothing is due, or when he is maliciously arrested for a great deal more than is due, this action is held to lie, because the costs in the cause are not sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due." (*Goslin v. Wilcox*, 2 Wils., 302-305; *Haldeman v. Chambers*, 19 Tex., 54.)

Upon this principle it has been held in this and other States, that a malicious suing out and levying upon property under the extraordinary writs of attachment and sequestration, without probable cause, gave a party injured by it an action for damages; and because, in obtaining such writs, it was required by law that a bond should be given to pay such damages as might be sustained for the wrongful suing out of the writ, an action was given by force of the statute, which would not exist at common law, for the wrongful suing out of the process, in which only the actual damages could be recovered. (*Kirksey v. Jones*, 7 Ala., 622; *Petit v. Mercer*, 8 B. Monr., 51; *Senecal v. Smith*, 9 Rob. La. Rep., 420.) That is, the wrongful suing out of the writ became a cause of action, whereas it was not before at common law. It is in the nature of an action on a covenant or contract (whether the suit is brought directly on the bond or not) for the recovery of actual damages—legal compensation for the legal injury. In reference to such cases, Mr. Sedgwick enumerates the various losses and expenses that may be incurred in

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the prosecution or defense of a suit in court, and refers to the distinction between those allowed as legal compensation for the injury and those not allowed, concluding as follows: "The law in fact aims not at the satisfaction, but at a division of the loss. And it is to be borne in mind that the same deficiency of compensation exists in case of defendants as well as plaintiffs. If the party who receives the injury is obliged to bear his part of the loss, so, on the other hand, the party wrongly charged only recovers his costs, and no allowance is made for his time, indirect loss, annoyance, or counsel fees." (Sedg. on Dam., 35, 38.)

There are other important questions in this case, though not now necessary to be decided. The transcript of the record contains two hundred and eighty-two pages, one hundred and fifty-eight of which are filed with the pleadings of the parties, each party having filed fifteen distinct pleadings, embracing motions, exceptions, petition and amendments, pleas and amended pleas, presenting, with many repetitions, facts, law, argument, history, and perhaps something more. Before submitting the case to the jury, the court made seventeen distinct decisions upon the exceptions to the pleadings, all of which rulings were excepted to. There are twelve separate bills of exceptions, and fifteen distinct grounds of error assigned. Such a multiplicity of pleadings and the consequences flowing from it, not necessary to be mentioned, could hardly have been anticipated by the founders of our system of pleading and practice, who, it seems, supposed that by confining pleadings to petition and answer they would avoid the subtleties and technicalities of the common law. It is not surprising, under such circumstances, that the judge and jury, in their action, should not reach either the law or the justice of the case.

For the error of the court in the charge, in allowing, as actual damage, the value of the time of defendant, A. Finberg, while attending to this case in the District Court, and the depreciation in the price of goods, it not having been

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alleged in the pleadings, the judgment is reversed and cause remanded.

REVERSED AND REMANDED.

WILLIAM B. KINGSTON ET AL. v. WILLIAM M. PICKINS ET AL.

1. **UNCERTAINTY IN DESCRIPTION IN A DEED.**—Where the uncertainty of description in a deed does not appear from the face of the deed, but arises from extraneous facts, parol evidence is admissible to remove or explain it.
2. **SAME—PRACTICE.**—In such cases the deed should be admitted, together with the parol evidence; the identity of the land is then a mixed question of law and fact.
3. **SAME.**—See a description, though vague and uncertain, held admissible, with other evidence to identify the land intended to be conveyed.
4. **CALLS IN A DESCRIPTION OF LAND.**—See a discussion of contradictory calls, with reference to ascertaining the meaning of the conveyance.

APPEAL from Delta. Tried below before the Hon. W. H. Andrews.

William B. Kingston and his sister, Mary E. Evans, joined by her husband, sued William Pickins and the heirs of Moses Belcher, deceased, claiming two ninths of a tract of one hundred and eighty acres, which had been the homestead of their deceased father, Thomas Kingston and his widow, Salina Kingston, and which it was alleged was the separate property of said deceased Thomas Kingston. Plaintiffs also alleged that defendants held by purchase the interest of the remaining heirs.

Defendants pleaded not guilty; statute of limitation of three, five, and ten years, and set up title in themselves.

The tract of land sued for was described in the petition as "part of the headright of Silas Evans, being one hundred and eighty acres sold to the said Thomas Kingston by John H. Portwood, by deed bearing date February 5, 1857," * *

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being "two hundred and twenty, less forty acres, out of the three hundred and twenty acres survey patented to Silas Evans, patent No. 110; the forty acres being out of the north-west corner of said two hundred and twenty acres, which is described as follows, to wit: one hundred acres, beginning three hundred yards from the southeast corner of said three hundred and twenty acres survey; thence running north, to include the house in which John H. Portwood lived; thence west, so as to make one hundred acres. The other one hundred and twenty acres lying due north of the first hundred, in a square as nearly as possible, out of which last one hundred and twenty acres the forty acres are taken."

On the trial, the plaintiffs, after proving their heirship, (with nine others,) as children of Thomas Kingston, deceased, and proving that Portwood had had possession of, and claimed by some kind of title under the patentee Evans, the land in controversy, offered in evidence the deed from Portwood to Thomas Kingston for one hundred and eighty acres out of the Evans three hundred and twenty acres tract; the field-notes and description in the deed being the same as set out in the petition, to which deed defendants objected, "because of uncertainty and want of description," which objection was sustained, and the deed excluded. In connection with the deed, plaintiffs offered testimony showing that the house referred to in the deed was near the north boundary of the Evans three hundred and twenty acres tract, (the lines of which ran with the cardinal points,) and that a survey could not be made by the calls in the deed with the house on the first tract, but that it could be made by disregarding the call for the house; that the house would be on the second tract if surveyed by the other calls; that there had been a stake north of the southeast corner of the Evans tract for many years, and which was regarded as the corner of the Kingston tract.

The court instructed the jury to find for the defendants, and plaintiffs appealed.

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Hale & Scott for appellants.

MOORE, ASSOCIATE JUSTICE.—The construction of a deed, being a matter of law, is for the court. If, therefore, the land intended to be conveyed by it, be so inaccurately described that it appears, on an inspection of the deed, the identity of the land is altogether uncertain and cannot be determined, the court should pronounce it void; but when the uncertainty does not appear upon the face of the deed, but arises from extraneous facts, as in other cases of latent ambiguity, parol evidence is admissible to explain or remove it. In such case the deed should not be excluded from the jury, but should go to them along with the parol evidence, to explain or remove such ambiguity; and the identity of the land is then a mixed question of law and fact, to be determined by the jury under the instructions of the court.

While the description of the land in the deed from Portwood to Thomas E. Kingston is unquestionably quite vague and indefinite, it cannot, we think, be said it shows upon its face that the land referred to cannot be identified. If it did, the defect could not be cured by the submission of evidence of extraneous facts to the judge, as a predicate for the admission of the deed in evidence, as appellants seem to have supposed.

It appears from the record that the principal, if not only, difficulty in locating the land from its description in the deed, arises from the fact that the house referred to in describing it, is situated farther north than the parties seem to have supposed when the deed was executed; while, should the other requirements for designating and surveying it be observed, the house is found upon the second instead of the first tract mentioned in the deed. This, however, in view of all the facts, is, in our opinion, a matter of little consequence. The call in the deed for extending the first line from the initial point north, to include the house, as clearly appears from the evidence, would conflict with other requirements for the loca-

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tion and designation of the land. But while it was evidently intended and understood by the parties to the deed that the house was upon the land sold, it cannot be supposed that it was a matter of any moment whether it was on the first or second tract. As it was uncertain how far east the second tract would extend, it was probably intended by the call for the extension of the first line far enough to include the house, to guard against the danger of its being found on running the lines on that part of the original survey not sold to Kingston, lying east of the second tract. The mention of it as indicating the length of the first line cannot be regarded, under the circumstances, as the superior or controlling call for locating and identifying the land described in the deed.

The two tracts were to contain two hundred and twenty acres, out of a square survey of three hundred and twenty acres; consequently the two tracts described in the deed must include all of the original survey except one hundred acres. The first tract contains one hundred acres, and calls to run from the beginning point north, with the east line of the original survey, and from the second corner by a direct west line; and as may be reasonably inferred, was intended to be a rectangular survey. The second tract lies immediately north of the first, and bounds on its second line, and is required to be surveyed as nearly as practicable in a square, and to include a reservation of forty acres in the northwest corner of the original survey. It follows that this tract lies between the north line of the original survey and the second line of the first tract called for in the deed, and extends from the west line of the original survey far enough to include its proper quantity of land. It is obvious, the further the first tract is extended north the greater must be the departure of the second from a square. It is also evident that the parties intended that the line from the beginning corner should only be protracted far enough north for a direct west line to include one hundred acres; and that they supposed if this were done, the house would be on this tract.

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In this they were mistaken. But we think it best comports with their intention to locate this tract so as to go as near the house as possible without giving to it an excess in quantity of land, interfering as little as practicable with the shape, quantity, and other calls of the second tract; and that this is done by a rectangular survey of the proper width across the original tract, to include one hundred acres, with the second tract, of the quantity of land called for, immediately north and adjoining the first, and as nearly in the required shape as practicable.

Appellants' counsel also claims that the judgment is erroneous, because, as he maintains, appellees claimed under a common source of title with appellants, and therefore the deed from Portwood to Thomas E. Kingston, their father, was immaterial. But whatever may be the fact, it does not appear from the evidence or by appellees' answers that they claim to have derived their title in this way. This proposition is consequently wholly inapplicable to the case as now presented.

For the error of the court in excluding from the jury the deed from Portwood to Thomas E. Kingston, the judgment is reversed and the cause remanded to the District Court.

REVERSED AND REMANDED.

F. BELDEN v. THE STATE.

CONDEMNATION OF LAND FOR TAXES.—Under "An act providing for the condemnation and sale of land for delinquent taxes," (Paschal's Dig., art. 7775,) the sheriff, on receiving from the comptroller the delinquent list for his county, and finding no personal property belonging to a delinquent tax payer, is required to certify such fact to the district clerk when filing the list with him; and the failure of the sheriff so to certify that he finds no personal property will be fatal to subsequent proceedings under said statute.

APPEAL from Marion. Tried below before the Hon. J. H. Rogers.

Crawford & Crawford and *D. B. Culberson*, for appellant, cited *Cooley Cons. Lim.*, 75, 391; *Clark v. Crane*, 5 Mich., 151; *Blackwell on Tax Titles*, 29; 20 Cal., 534; 11 Mass., 396; 13 Wis., 328; *Wally's Heirs v. Kennedy*, 2 Yerger, 554; *Clegg v. The State*, 42 Tex., 605.

G. T. Todd, also for appellant.

A. J. Peeler, *Assistant Attorney General*, for the State.

MOORE, ASSOCIATE JUSTICE.—This is a proceeding instituted by the State under the provisions of the statute of June 2, 1873, (Paschal's Dig., 7775,) entitled "An act providing for the condemnation and sale of land for delinquent taxes," for the purpose of collecting the taxes for which appellant is alleged to be liable on the lot described in the judgment.

It is insisted by appellant that this statute is in conflict with section 22 of article XII of the Constitution of 1869, and can therefore afford no support to the proceedings had in this case, or warrant for the judgment upon them. If the constitutional provision upon which the determination of this question depends were still in force, and no other mode than that provided in this act had been made by the Legislature for the collection from delinquents of taxes assessed upon land, its present determination might be of great practical importance, and would probably be found not entirely free from difficulty. But in view of the constitutional and statutory changes which have been made since this proceeding was instituted, we think it unnecessary to add anything to what has previously been said (*Clegg v. The State*, 42 Tex., 605) in regard to the restrictions in the Constitution of 1869 upon the Legislature in collecting taxes upon landed property.

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If it is conceded that this statute is in all respects in strict accord with the provisions of the Constitution in force when it was enacted, it plainly appears that one, at least, of its fundamental requirements to the condemnation and decree of the sale of land for the taxes charged upon it, has not been complied with. The statute requires the sheriff, when the delinquent list is transmitted to him by the comptroller, to seize and sell any personal property belonging to the delinquent that may be in his county subject to the payment of such tax, the interest due on the same, and all costs and fees, &c. And before filing the list with the district clerk, that it may be proceeded upon for the condemnation and sale of land, the sheriff must certify that he knew of no personal property in his county out of which he can make the taxes due. This requirement of the statute was altogether omitted; and as it is preliminary to the proceeding, the general exception of appellant should have been sustained. As its omission could not be supplied nor the defect cured, the proceeding should have been dismissed.

The judgment is reversed and the proceedings dismissed.

DISMISSED.

GAMMAGE & HUNTER v. DANIEL RATHER, ADMINISTRATOR.

1. ATTORNEYS' FEES—EXPENSES OF ADMINISTRATION.—Reasonable attorneys' fees for necessary service actually rendered in an estate, form part of the expenses of administration.
2. SAME.—If the attorney looks to the estate for payment of his fees, his claim must be authenticated by affidavit, and presented for approval as other debts of the estate.
3. SAME.—If payment of such fees be exacted of the administrator, then such expense will form an item in his account, and will be allowed as such, on a proper showing, in his settlement.
4. SAME.—The administrator, in paying such fees, may authorize the appropriation to that use of money to be collected for the estate by the attorney to whom such fees are due.

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5. **SAME—LIMITATION.**—An administrator sought, by motion against a law firm, to recover money collected by them, belonging to the estate. The defendants set up their services for the estate, rendered over two years before, and that they were authorized to appropriate the funds collected to the satisfaction of their claims: *Held*, Error to sustain exceptions to the plea, on the ground of the statute of limitation.

ERROR from Anderson. Tried below before the Hon. M. D. Ector.

The facts are fully given in the opinion.

Reagan, Greenwood & Gooch, for appellants.

Word & Williams, for appellee.

MOORE, ASSOCIATE JUSTICE.—This was a summary proceeding, or motion by the appellee Rather, as administrator of the estate of Isaac Kirksey, deceased, to compel appellants to pay money belonging to said estate, alleged to have been collected by them as his attorneys.

In answer to the motion, appellants admit the collection of the amount shown in an account appended as an exhibit to their answer, but aver that it had been appropriated, with the knowledge and consent of appellee, and in accordance with the understanding and agreement between themselves and appellee, to the payment of the several amounts stated in said exhibit, due them for professional services rendered to appellee as administrator of said estate; that the services rendered by them were valuable to the estate, and were proper and necessary for its due administration; that said services were rendered at the special instance and request of appellee; and the amounts charged for the same were reasonable, &c. To so much of this answer as sets up an indebtedness in favor of appellants, appellee excepted; and among other grounds of special exception, alleges that it appears by appellants' account that no item thereof had accrued within two years next before the filing of his motion.

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This exception was sustained by the court, and, a jury having been waived, judgment was rendered against appellants for the amount admitted in their answer to have been collected, although it is more than appellee charges in his motion, and considerably more than was attempted to be established by evidence on the trial.

We are unable to perceive any valid ground on which the judgment of the court sustaining this exception can be maintained. The statute unquestionably puts it beyond all question that reasonable attorneys' fees for necessary service actually rendered are a part of the expenses of administration, which are entitled to priority of payment over all charges against estates, except funeral expenses. (Paschal's Dig., arts. 5675, 5676.) The party rendering such service, if he sees fit, or agrees with the administrator to do so, may look to the estate, or directly to the administrator, for payment of his claims. If he claims that the estate is indebted to him for the value of his services, and seeks to hold it liable, he should authenticate and present his claim for allowance and approval, as other debts of the estate; and when this is done, it will be classed and paid, according to its order of priority. But parties cannot be compelled to render service and look to the estate for compensation, unless they are willing to do so. It is evident that frequently the administrators will have to incur expenses in the management and preservation of estates, for which they will be forced to pay in cash, or make themselves directly responsible; and when they do this, the charge for the service will become an item in the administrator's account, and will be allowed him on his settlement, on its being made to appear that it is a reasonable charge for necessary service actually rendered. All the items of appellants' account are alleged in their answer to be for expenses of administration, which might have been paid for by the administrator when rendered; and if so, he certainly could have paid them by authorizing the appropriation of the money collected by appellants for him to this pur-

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pose. This, if the averments in the answer are true, he did. They are not by this answer now seeking to establish a debt against the estate, (unless for a small balance which, it appears from what has been previously said, they cannot do,) but to account for and show a proper appropriation of the money which they admit they had collected for appellee.

For the error of the court in sustaining appellee's exception to appellants' answer, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Chief Justice ROBERTS did not sit in this case.

HUBBARD CARTER ET AL. V. THOMAS M. ATTOWAY.

1. FORECLOSURE—PARTIES.—In a suit to enforce the vendor's lien, a subsequent vendee, in possession, and claiming under a recorded deed, is a necessary party.
2. SAME—SALE.—As against a purchaser, of whose claim there is notice, a sale had under a decree of foreclosure against the original vendee alone, is not sufficient to pass title.
3. SAME.—Nor is it different where such purchaser knew, at his purchase, that the purchase-money, in whole or in part, was unpaid, and knew of the proceedings to enforce the lien.
4. PRACTICE.—The pleadings not admitting that the defendant held by purchase prior to the commencement of the suit to foreclose, it was not error to admit the decree and sale made under it, when offered as evidence of title.
5. FORECLOSURE—PLEADINGS.—Where such purchaser, under decree of foreclosure, brought trespass to try title against a prior purchaser, the equities which the plaintiff had as against the land, by his owning the judgment, by virtue of his purchase of the land and payment of the judgment, cannot be litigated. By proper pleadings, the plaintiff can enforce his equities against the land.

APPEAL from Rusk. Tried below before the Hon. M. D. Ector.

Thomas M. Attoway sued Carter, in trespass to try title for

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159 acres of land. Z. B. Garrison, landlord, made himself party defendant. The defendants pleaded not guilty.

On January 15, 1867, Nancy Easley sold the land in controversy to G. C. Keys. On the 1st July following, Keys sold to defendant Garrison, and the deed was recorded May 15, 1868.

The purchase-money, notes given by Keys to Nancy Easley, were by her assigned to B. C. H. Johnson, who, July 29, 1868, brought suit to enforce the vendor's lien against Keys. Garrison was not made a party. Under a decree of foreclosure, Attoway became the purchaser, and this suit was brought under that title against Carter, tenant of Garrison.

Judgment was rendered for the plaintiff, and Carter and Garrison appealed. All other facts necessary are given in the opinion.

Smith & Casey and *Morris & Gould*, for appellants, cited *Mason v. Russell's Heirs*, 1 Tex., 726; *Punderson v. Love*, 3 Tex., 60; *Rivers v. Foote*, 11 Tex., 662; *Dalby v. Booth*, 16 Tex., 565; *Christy v. Scott*, 14 How., (U. S.) 293; *Stroud v. Springfield*, 28 Tex., 651; 1 Greenl. Ev., secs. 286, 288, 296.

Jones & Henry, for appellee, cited *Fitzhugh v. Custer*, 4 Tex., 399; *Drinkard v. Ingram*, 21 Tex., 654; *Bowers v. Chaney*, 21 Tex., 367; *Robbins v. Kimble*, 2 Tex., 258; *Baldwin v. Dearborn*, 21 Tex., 448; *St. Clair v. McGehee*, 22 Tex., 5; *Cayce v. Powell*, 20 Tex., 771; *Grassmeyer v. Beeson*, 18 Tex., 765; *Davis v. Loftin*, 6 Tex., 496; *Willis v. Chambers*, 8 Tex., 150.

Robertson & Herndon, for appellants, cited *Johnson v. Byler*, 38 Tex., 606; *Buchanan v. Monroe*, 22 Tex., 543; *Mann v. Falcon*, 25 Tex., 276; 4 Kent, 186.

GOULD, ASSOCIATE JUSTICE.—This was an action of trespass to try title, in which the plaintiff claimed as purchaser at a

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sale under a decree enforcing a vendor's lien, rendered in a suit brought by B. C. H. Johnson against George C. Keys. At the time that suit was commenced, Garrison, the defendant in the present case, was in possession of a part of the land on which the lien was sought to be enforced, claiming it under a duly recorded deed to himself from Keys. The plaintiff in that suit was certainly affected with notice of Garrison's claim, and should have made him a party. As he was not made a party, his rights cannot be affected by the foreclosure and sale.

At the late Galveston Term it was held, (and the conclusion was arrived at after the question had been for some time before the court in different cases, and had received mature consideration,) that, as against a purchaser of whose claim there is notice, a sale, had under a decree of foreclosure against the original vendee alone, is ineffectual to pass the title. (*Preston v. Breedlove*, 45 Tex., 47; *Byler v. Johnson*, 45 Tex., 509.)

Although it appears that Garrison was aware of the suit brought by Johnson, and was indeed a witness on the trial, it is not perceived that this should take the case out of the general rule just stated. He was under no obligation to appear in the case.

The court below, in its charge, held that Attoway, by his purchase under the decree of foreclosure, was entitled to recover, if Garrison bought the land with notice that any portion of the purchase-money was unpaid. As this ruling is erroneous, and goes to the foundation of the plaintiff's case, it is not material to inquire whether or not the assignment of errors is sufficient to present it.

There is a bill of exceptions, and an assignment of error to the admission in evidence of the judgment in the case of *Johnson v. Keys*. As the court could not know in advance that Garrison would show that he held under a prior conveyance from Keys, of which Johnson had notice, the evidence was properly admitted. In a case where the plaintiff in his pleadings admits such facts, the judgment is properly ex-

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cluded. (*Byler v. Johnson*, 45 Tex., 509.) But ordinarily the evidence should be admitted, and the jury instructed as to its legal effect.

In this case there were no pleadings raising any other issue than that of title, and under such pleadings the plaintiff could not enforce against Garrison any equitable rights which he may have acquired by his purchase. (*Mann v. Falcon*, 25 Tex., 272.) By his purchase he paid off the judgment in favor of Johnson against Keys, and may claim to be subrogated to all the rights which Johnson had to enforce his lien against the land in Garrison's hands. (*Harrison v. Oberthier*, 40 Tex., 390.) No reason is perceived why he may not so amend his pleadings as to set up those equities in this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

SARAH M. SCOGINS v. S. R. PERRY ET AL.

1. DAMAGES AGAINST SHERIFF FOR NOT PAYING OVER MONEY.—The liability of a sheriff and his sureties to pay ten per cent. per month on the amount collected by him under execution, and which he fails, after demand, to pay over to the party entitled to receive it, can be enforced in no other way than by motion.
2. STATUTE CONSTRUED.—The damages provided for in article 3781, Paschal's Dig., against sheriffs, can only be enforced by motion.
3. DAMAGES AGAINST SHERIFF—LACHES.—It may be questioned whether a party can, at his mere option, and without excuse for delay, allow several terms of courts to pass and then claim the heavily accumulated penalty of ten per cent. per month from the date of such failure.
4. PRACTICE.—In a suit instituted in the ordinary way, by petition against the sheriff and his sureties for money by him collected, and which, after demand, he had failed to pay over, and for ten per cent. per month damages: *Held*, The suit being brought twenty months after the collection, that a party claiming the benefit of a penal statute must bring himself strictly within its provisions, and a demurrer to so much of the petition as claimed the penalty of ten per cent. per month was properly sustained.

Argument for the appellant.

APPEAL from Harrison. Tried below before the Hon. F. B. Sexton, special district judge.

This was an action brought in the District Court of Harrison county, on the 31st day of January, 1871, by appellant's intestate, Sarah M. Scogins, surviving wife, &c., against appellees, to recover of S. R. Perry, as sheriff of Harrison county, and his sureties on his official bond, a sum of money, (\$1,760.98,) and interest thereon, alleged to have been collected by said sheriff for Scogins, and for damages, at ten per cent. per month, from May 20, 1869, when demand was made, for failing and refusing to pay the same.

Citation was issued to appellees on the 1st February, 1871, requiring said parties to appear and answer them on the first Monday in February, 1871, of which there was service, and the parties appeared and answered the said motion on the 10th February, 1871, and on 14th February, 1871.

The original plaintiff in said motion died, and appellant Charles J. Evans, as the administrator of the estate of A. G. Scogins, the husband, and of Sarah M. Scogins, the surviving wife, came and made himself party plaintiff, and in that capacity prosecuted the suit in the court below.

On the 28th day of August, 1874, defendants amended their exceptions to plaintiff's petition and motion, which exceptions were by the court, upon the trial of said cause on 29th August, 1874, sustained, so far as the same applied to damages claimed by plaintiff, at the rate of ten per cent. per month, to which plaintiff excepted.

The cause proceeded to trial, which resulted in judgment for the plaintiff for \$1,342.90, principal and interest, and cost of suit. Plaintiff's motion for new trial, assigning the error in the court in sustaining demurrer to claim for damages at ten per cent. per month, was overruled, and plaintiffs appealed.

H. McKay, for appellant, cited *Scogin v. Perry*, 32 Tex., 29; *De la Garza v. Booth*, 28 Tex., 483; *Poer v. Brown*, 24 Tex., 36; *Paschal's Dig.*, arts. 3781, 5109.

William Stedman, for appellees.

GOULD, ASSOCIATE JUSTICE.—The liability of a sheriff and his sureties to pay ten per cent. per month on the amount which that officer has collected under execution, and fails, after demand made, to pay over to the party entitled to receive it, can be enforced in no other way than by motion. (*De La Garza v. Booth*, 28 Tex., 482; *Paschal's Dig.*, art. 3781.)

The object of the statute is to provide a "quick, simple remedy, to close a suit already determined;" and the same penalty, to which it subjects the sureties as well as the sheriff, cannot be enforced by a distinct suit on the bond, or by "a new suit which may have all the expensive attributes of a bill in equity," and be attended with all its delays. (*Beaver v. Batte*, 19 Tex., 113; *Hicks v. Gray*, 25 Tex., 83.)

Whilst the statute does not prescribe that the motion must be made at or before the term of court next following the demand, it may be questioned whether a party can, at his mere option, and without excuse for the delay, allow several terms of court to pass, and then claim the heavily accumulated penalty. In providing a prompt remedy, it was scarcely contemplated that it should be used oppressively, or as a means of profit.

Without, however, undertaking to say at what time the motion must be made, we are of the opinion that the fact that this proceeding was not commenced until full twenty months after the alleged demand, may well receive some consideration in determining its character.

Although the object of the proceeding was to recover the penalty as well as the principal and interest, it was in the form of a regular petition, filed apparently in vacation, setting forth at length a cause of action, praying for citation to defendants as in ordinary cases, and praying, it is true, for judgment for the penalty, but praying also for general relief. In its form, it appears to be, not a motion, which

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might have been filed, and, notice being served as in other cases of motion, disposed of during the same term of court, but to be a petition instituting a new suit; and, as far as the record shows, the case took its regular place on the trial docket amongst other new suits.

In view of these facts, and having in mind that a party claiming the benefit of this penal statute must bring himself strictly within its provisions, we hold that the court did not err in sustaining exceptions to so much of the petition as claimed ten per cent. per month on the amount collected.

The judgment is accordingly affirmed.

AFFIRMED.

NAOMI PETERS AND HUSBAND v. Z. C. CLEMENTS.

1. NOTICE.—The entry upon the records of deeds of an instrument not legally authenticated for record, has no effect as notice.
2. EXECUTED CONTRACT FOR SUBSTITUTE IN THE C. S. ARMY.—Such contract, after performance, is effectual in support of payment under a plea of innocent purchaser.
3. VENDOR AND VENDEE—ESTATES IN EACH.—It has been settled, by a long train of decisions, that where the vendor retains in his deed a lien for the purchase-money, he has the superior right to the land against the vendee, and those in privity with him, as long as the purchase-money remains unpaid; until the land is paid for, the vendee, and those claiming in his right as against the vendor, have merely an equitable and not the legal title to the land.
4. NOTICE—RECITALS.—Subsequent purchasers are bound by the recitals in the deeds through which they claim, and are held to have had notice of whatever equities are apparent in the line of their title.
5. FORECLOSURE OF VENDOR'S LIEN.—Where the vendee is in default in the payment of the purchase-money, the vendor may sue for the land and recover it, unless the vendee make good his equitable title by payment; or he may foreclose his lien, and subject the land to sale for the payment of the purchase-money.
6. ESTOPPEL.—Where the vendor forecloses his lien, and a third party becomes the purchaser, the vendor is estopped from controverting the title, or from taking advantage of any irregularities in the

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proceedings of foreclosure; and if necessary to the security of the purchaser, equity will subject him to the rights of the plaintiff or vendor.

7. **SEPARATE PROPERTY.**—Where, at a sale enforcing the vendor's lien in favor of the husband, the land was bid off by the agent of the husband, and the sheriff's deed made to the wife by the direction of the husband, the amount of the bid being credited on the judgment, in a suit brought by the wife, joined by her husband, on such title,—the court will regard the proceedings as vesting title in the wife as separate property.
8. **PARTIES—VENDOR'S LIEN.**—Proceedings by suit, judgment, and sale to enforce the vendor's lien against the vendee, do not conclude the rights of a purchaser who had a deed and was in possession at the institution of the suit.
9. **PARTIES—PRACTICE.**—In a suit against a purchaser from a vendee, of land on which the vendor's lien rested, and of which such purchaser is affected with notice, the defendant has the right to redeem, or to have the original vendee made a party, and others, who may be purchasers, and have their equities adjusted.
10. **SAME—CHARGE OF COURT.**—In such suit it was error to instruct the jury that both plaintiff, who claimed under the purchase under decree enforcing the vendor's lien, and the defendant, holding by purchase of vendee before suit, held under the original vendee; and that defendant, not being party to the suit enforcing the lien, was on that account entitled to recover.

APPEAL from Cass. Tried below before the Hon. M. L. Crawford.

This was a suit by Naomi Peters, joined by her husband, to try the title to four hundred and fourteen acres of land, alleged to be the separate property of Naomi Peters.

The land in controversy was part of a one-third league patented to Richard Peters. Richard Peters, in 1859, sold the third league, less three hundred and twenty acres, to Thomas M. Peters, who on 14th August, 1860, conveyed the land sold to him to W. F. Connell. The deed to Connell was made jointly by Thomas M. and Naomi Peters, in the State of Alabama, and was acknowledged by them (not privily by the wife) before a justice of the peace in Alabama, and was recorded in Cass county on this proof. The certificate of authentication is not, and does not, purport

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to be under seal, and does not purport to be made by a judge of a court of record having a seal. It bears date 14th September, 1860.

This deed shows that part of the purchase-money was secured by notes described in the deed, and it was not questioned that as between Peters and Connell they were a lien on the land.

On the 14th day of November, 1863, W. F. Connell sold the four hundred and fourteen acres in controversy, by deed of that date, to G. H. Fitzgerald, "for three thousand dollars, or its equivalent, as his substitute in the Confederate army," by deed with general warranty, which deed was duly recorded. Connell went into possession of the land in 1863, under his deed from Peters.

On 14th September, 1864, G. H. Fitzgerald and wife conveyed the same land, by deed with general warranty, to Rufus Day, which deed was duly recorded.

On 26th November, 1867, R. H. Day conveyed the same land, by deed with general warranty, to L. C. Clements, defendant in this suit, which was duly recorded.

On the 23d November, 1865, Thomas M. Peters filed in the District Court of Cass county his petition against William F. Connell, to recover the notes given by him for the land, and to foreclose the vendor's lien on the whole tract, including the four hundred and fourteen acres sold by Connell to Fitzgerald November, 14, 1863. Neither Fitzgerald nor his vendees were made parties to this proceeding. The court rendered judgment in favor of Peters and against Connell for the debt, and foreclosing vendor's lien. On this judgment an order of sale was issued, and the land sold by the sheriff to Naomi Peters, wife of Thomas M. Peters, on the first Tuesday in December, 1869, for \$2,200, which was paid by crediting order of sale with said sum, and deed was made to her for the land by the sheriff. This purchase was made by J. J. Peters, agent of Thomas M. Peters, and the credit and deed made by his direction.

Argument for the appellants.

J. J. Peters, for appellants, cited *Briscoe v. Bronaugh*, 1 Tex., 333; 1 Story's Eq., 385, 400, 405, 406; Story's Eq. Pl., 156; *Shearon v. Henderson*, 38 Tex., 250; *Baker v. Ramey*, 27 Tex., 59; *Watkins v. Edwards*, 23 Tex., 443; *Beaty v. Whitaker*, 23 Tex., 528; *Rorer on Jud. Sales*, 215, 443; *Wendell v. Van Rensselaer*, 1 Johns. Ch., 344; *Sudg. on Vend.*, 1022, and note; 31 Tex., 257; *Donley v. Tindall*, 32 Tex., 55; *Morgan v. Taylor*, 32 Tex., 366; *Kennett v. Chambers*, 14 How., 38; *Napier v. Jones*, 47 Ala., 90; 23 Ala., 255; 4 Kent, 10, 151; *Johnson v. Thweat*, 18 Ala., 471; 1 Yerg., 366; 2 Kent, 324; 10 Peters, 161, 175; 5 Coke, 113; *Coke on Lyt.*, 309; *Paschal's Dig.*, 52, 95; *Rivers v. Foote*, 11 Tex., 671.

Mason & Campbell, also for appellants.

1. The deed from R. H. Day to the appellee, of 25th November, 1867, so far as the rights of the appellants were concerned, conveyed no title; was in effect a nullity. The said purchase was made *pendente lite*.

During the pendency of suit, viz, on the 25th November, 1867, the appellee, with full knowledge of said lien and of the pendency of said suit, purchased the land from Day, and took Day's deed therefor. That he had constructive notice of the fact is attested by the registry of the deed and the pendency of the suit pertaining to the specific property; and that he had actual notice, we think is sufficiently shown from the testimony.

The appellee being a purchaser *pendente lite*, was not a necessary party in the suit of *Peters v. Connell*, to enforce the lien. Fitzgerald and Day were not necessary parties, because the former had parted with all his interest before the institution of the suit, and the latter to appellee before its termination.

The purchase of appellee from Day was precisely as if he had purchased from Connell, the original vendee of Peters. It will not be questioned, if appellee had purchased directly from Connell *pendente lite*, he would have been precluded

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from any and all rights under his purchase. But we contend that as assignee of Day, who was assignee of Connell, he (appellee) stands in no better attitude. (Story's Eq., sec. 406.)

"He who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title, and such purchaser need not be made party to the suit." (Ib.)

Therefore, as between the parties in interest, the conveyance from Day to appellee was a nullity, and, in the language of Judge Story, "should be treated as if it never had any existence." (Ib.; 1 *Briscoe v. Bronaugh*, 1 Tex., 326.) On the same subject, see *Shearon v. Henderson*, 38 Tex., 250, and cases cited.

The case at bar was founded on the suit of *Peters v. Connell* for the recovery of the debt and "in relation to" the land in question, setting up a particular equity therein, to wit, the vendor's lien, and hence the appellee at the date of his purchase was charged with notice of said equity and of the proceedings to enforce it. In such case our court has held that such purchaser is a *mala fide* purchaser, and not a necessary party to the suit. (*Briscoe v. Bronaugh*, 1 Tex., 332, 333.)

The South Carolina court held, "when a bill is filed to obtain an estate charged with the payment of debts, and the property is purchased during the pendency of the proceedings, the purchaser takes it subject to the complainant's claim. (*Edmonds v. Cranshaw*, 1 McCord Ch., 264.)

We therefore insist that the charge asked for by appellants, and refused by the court, should have been given to the jury, to wit: "If Clements had notice that the land he claimed was involved in the suit of *Peters v. Connell*, then he was bound to take notice thereof, and would be bound by the judgment rendered in that case." (Story's Eq., 406, as above cited.)

Appellee, therefore, being a purchaser *mala fide*, was a trespasser and should be ejected by this suit.

2. But suppose appellee and Fitzgerald and Day were all necessary parties in the suit of *Peters v. Connell*: what then? All these vendees of Connell bought the land with full knowledge of the vendor's lien. The lien was expressly retained in the deed from Peters to Connell. All that Fitzgerald, Day, and appellee acquired was the equity of redemption; and the failure to make them parties in the foreclosure suit did not extinguish the vendor's lien. If necessary parties to that suit, the only result from the judgment therein, as far as they were concerned, was that their rights were not concluded. What were those rights? Nothing but the right to redeem. (*Buchanan v. Monroe*, 22 Tex., 537.)

We refer to the case of *Baker v. Ramey*, 27 Tex., 59, as in point. There the court held, in effect, that although the vendee who purchased from the original vendee was not made a party to the suit to foreclose, yet he cannot hold the land without paying the purchase-money, and will be ejected in an action of "trespass to try title."

3. Appellee was estopped from setting up title in himself to the land in dispute. He stood by and permitted the land to be sold without objection. (See his own testimony, p. 68; 1 Story's Eq., sec. 385, n. 5.)

4. As to 3d assignment of error, we refer to *Kennett v. Chambers*, 14 How., (U. S.), 38.

5. See 8th assignment of error. Appellee, in his answer, having pleaded his title, should have been confined to it. (*Rivers v. Foote*, 11 Tex., 670.) He gave no notice in his answer that he would rely on the deed from Fitzgerald to Day, and should not have been permitted to read it.

Jones & Henry, for appellees.—Plaintiff Naomi Peters sued for the land as her separate property. The proof showed it was community. (*Mitchell v. Marr*, 26 Tex., 330; *Higgins v. Johnson*, 20 Tex., 389; *Rose v. Houston*, 11 Tex., 324; *Hatchett v. Connor*, 30 Tex., 104; *Holloway v. Holloway*, 30 Tex., 164.)

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The deed from Peters and wife to Connell, having been acknowledged before a justice of the peace, was improperly admitted to record. (Paschal's Dig., art. 1004.)

Fitzgerald was a *bona fide* purchaser, and his want of notice protects defendant Clements, who claims through him. (Story's Eq., secs. 409, 410.)

Plaintiff, by his agent, admitted defendant Clements's title, induced him to expend money to improve the land, which estops him. (Fonblanque's Eq., Note to p. 143; Story's Eq., pp. 412, 413, secs. 385-388.)

The illegality of the consideration of the deed from Connell to Fitzgerald will not now be inquired into, it being an executed contract. (Piegar v. Twohig, 37 Tex., 225; Donley v. Tindall, 32 Tex., 43.)

The charge asked and refused was inapplicable. It was not the duty of the court to modify it. No such issue was made by the pleadings. (Hagerty v. Scott, 10 Tex., 525; Thompson v. Shannon, 9 Tex., 536; Wheeler v. Moody, 9 Tex., 372; Davis v. Loftin, 6 Tex., 489; Hardy v. De Leon, 5 Tex., 211; Wells v. Barnett, 7 Tex., 584.)

The plaintiff asked no charge as to the law of estoppel.

MOORE, ASSOCIATE JUSTICE.—On the 14th of August, 1860, Thomas M. Peters and Naomi Peters executed to W. F. Connell their deed for eleven hundred and fifty-six acres of land, of which the tract here in controversy is a part, retaining in the deed a lien to secure two notes given for a part of the purchase-money, and payable to Thomas M. Peters or bearer. The execution of the deed was acknowledged by the grantees on the day of its date, before the judge of probate of Laurence county, State of Alabama; but the certificate of the judge is not authenticated by a seal, nor does it show that the officer making it was a judge of a court of record having a seal. Nevertheless, the deed, by virtue of this certificate, was, on the 27th of December, 1860, copied by the

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clerk of the County Court of Cass county, on the registry of deeds for said county.

On the 14th day of November, 1863, Connell executed a deed for that part of the land here in controversy to G. H. Fitzgerald, which deed was duly recorded on the 8th of December following, and Fitzgerald went at once into possession of the land, and commenced to improve it. On the 14th of September, 1864, Fitzgerald sold it to Rufus Day, who also placed his deed on record immediately after its execution, and at once took and retained possession of the land until the 25th day of November, 1867, when he sold it to appellee Clements.

In the meantime, however, Connell having failed to pay said notes on the 25th of November, 1865, Peters brought suit in the District Court of Cass county against him for the amount due on said notes, and to foreclose the lien retained in the deed to secure their payment; and on the 3d day of February, 1869, judgment was rendered in favor of Peters for the sum of three thousand two hundred and eighty-four dollars, and that the land bought by Connell be sold for its payment. In pursuance with this judgment and the order of sale issued by virtue thereof, said eleven hundred and fifty-six acres of land, of which the tract in controversy is a part, was, on the first Tuesday in December, 1869, exposed to sale by the sheriff, and bid off by the agent and attorney of plaintiff in execution. And at the instance and by the direction of said agent and attorney, the sheriff executed a deed therefor to Naomi Peters, the wife of said Thomas M. Peters. And on the trial of this case in the court below, said attorney testified that he had been instructed by said Thomas M. Peters, previous to the recovery of the judgment, if Connell would surrender the land in payment of the notes, to have the deed made to said Naomi, his wife.

From the line of defense in the court below, and argument urged in this court in support of the judgment, appellee seems to suppose, although he purchased the land while the

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suit against Connell to foreclose the lien was pending, as he claimed, under Fitzgerald, who was not a party to the suit, it was immaterial whether he was chargeable with notice of appellant's claim to the land or not. In this we fully concur with him, if he shows the title he acquired from Fitzgerald is superior to and should prevail over that of appellant, if it was asserted by Fitzgerald. It is also quite evident that the authentication of the deed from Peters and wife to Connell did not authorize its registration, and the copying of it, therefore, by the clerk in the book for the record of deeds is inoperative, and neither affects Fitzgerald nor any one else with notice of its contents.

We are also of opinion that appellants, by their replication to appellee's answer, admitted that the consideration for the deed to Fitzgerald had been executed. And it may also be conceded that the consideration expressed in the deed after its performance is just as effectual in support of the plea of innocent purchaser as if the full value of the land had been admitted to have been paid in gold coin; as to which, however, as it is unnecessary to the decision of the case, we express no opinion. Still, it is most evident that neither Fitzgerald nor any one in privity with him, without the payment of the purchase-money, can, so long as the lien retained in the deed remains valid and subsisting, and is such a one as a court of equity would lend its aid to enforce, claim to have acquired from or under Connell a valid title to the land. Nor does the failure of Peters to record the deed in the slightest degree relieve Fitzgerald, or any one purchasing from him, from constructive notice of the lien retained in the deed to Connell.

It has been settled, by a long train of decisions, that where the vendor retains in his deed a lien upon the land for the purchase-money, he has the superior right to the land against his vendee and those in privity with him as long as it remains unpaid. That where the lien for the purchase-money is reserved in the deed, the title does not vest absolutely in the

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vendee until the purchase-money is paid. Until the land is paid for, the vendee and those claiming in his right, as against the vendor, have merely an equitable and not the legal title to the land. Although a lien of this kind is frequently inaccurately spoken of as a vendor's lien, the legal and equitable rights of the parties affected by it are directly the reverse of what they are in cases of purely equitable liens. The latter is a mere equity, to be enforced against the vendee, who holds the legal title; while in the former, the legal title is in the vendor, and the rights of the vendee as against him are merely equitable. (*Dunlap v. Wright*, 11 Tex., 597; *McAlpin v. Bennet*, 21 Tex., 535; *Baker v. Ramey*, 27 Tex., 52; *Darst v. Trammell*, Id., 129; *Monroe v. Buchanan*, Id., 241.) But if the right of Peters to enforce his lien against the purchaser from Connell was dependent upon the same principles which are applicable in cases for the enforcement of vendors' liens, it is still very obvious that Fitzgerald and the purchasers under him must be held to have had notice of the lien retained in the deed to Connell. It is an elementary principle, than which none is better established, both by reason and authority, that subsequent purchasers are bound by the recitals in the deeds through which they claim, and are held to have had notice of whatever equities are apparent in the line of their title. (*Carver v. Astor*, 4 Pet., 1; *Brush v. Ware*, 15 Pet., 93; *Scott v. Douglass*, 7 Ohio, 228; *Cordova v. Hood*, 7 Wall., 1.)

Although neither Fitzgerald, nor a purchaser from him, could have successfully resisted the suit of Peters against Connell to foreclose his lien, if he had been made a party to it, still it remains to be determined to what extent the judgment against Connell and the sale of the land under it, will affect the rights of the parties in this case, by reason of the fact that Day, appellee's immediate vendor, whose deed was upon record, and who was in possession of the land when the suit was brought, was not made a party, as has been repeatedly held by the court he should have been.

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And first, as to its effect upon appellants.

When the action against Connell was brought, the legal title to the land upon which the lien was retained was in Thomas M. Peters, as the head of the community of himself and wife. He might have sued Connell, or those claiming under him, and recovered the land, if they failed to make good their equitable title by the payment of the purchase-money; or, if he preferred it, he could, as he did, foreclose his lien, and subject the land to sale for its payment. When the latter course is pursued, and a third party purchases at such sale, the vendor is unquestionably estopped from controverting or disputing the purchaser's title. As the sale is at his instance, and for his benefit, he cannot take advantage of any defects or irregularities in the proceedings under which it is made or which he has brought about. If he has gotten the full benefit flowing from the judgment and sale under it, he will be estopped in favor of the purchaser from denying its validity. And if the purchaser cannot otherwise get the benefit of his purchase, equity will subject him to the rights of the plaintiff. Unless, therefore, the fact that the amount bid for the land, when sold by the sheriff, was paid by a credit on the judgment, and that the deed was made to a married woman gives it a different effect, it must be held that Mrs. Peters took, by the judgment, order of sale, and the sheriff's deed, the title of the land which was in Peters previous to the institution of the suit. Appellee insists that as the consideration was not paid for by Mrs. Peters, the deed to her cannot be held to have vested the title in her as separate property; and as she has alleged the land to be her separate property, sues for it as such, she cannot recover it in this action, whatever may be thought of his title. (26 Tex., 330; 20 Tex., 389; 30 Tex., 104; *id.*, 164.) But the testimony shows that it was the purpose and desire of Peters, if he got the land back in payment for the amount due upon the notes given for it, to have the title made to his wife. The petition clearly shows that he approved and sanctioned the

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act of his attorney in having the sheriff make the deed to her. And as he recognizes and admits the land to be her separate property, it must unquestionably be held, that it was his purpose and intention, in having it conveyed to his wife, that she should take it as separate property. Hence, as between themselves and parties whose rights are in no way affected by its being so regarded, it must be held to be her separate estate. (*Story v. Marshall*, 24 Tex., 305; *Higgins v. Johnson*, 20 Tex., 389.)

How, then, does the judgment against Connell affect appellee?

It has been repeatedly decided by this court, that in suits to foreclose mortgages and liens, subsequent purchasers and incumbrancers, of whose claims the plaintiff has notice, either from their possession of the land or the record of the title or incumbrance, should be made parties. And, if this is not done, the judgment of foreclosure is *res inter alias acta*, and will in no way bind or affect them. Appellee, by purchase from Day, who, through Fitzgerald, had acquired the equitable title of Connell, was entitled to the equity of redemption, if the deed from Thomas M. Peters is treated as a mortgage, and if Connell still owns the balance of the tract, to have him brought before the court, and that part of it condemned to sale first; or, if it has been sold, to bring the purchasers before the court, and have the rights of all parties equitably adjusted; or, if he choose to do so, to pay the balance of purchase-money for which the lien was retained, and thereby convert his equitable right into the superior title.

From what has been said, it is apparent that the charge of the court, to the effect that both parties claim the land under Connell; that the deed from the sheriff, if the act of his agent in having it made to Mrs. Peters was authorized or ratified by Peters, vested in her such title as Connell had at the institution of the suit against him; but if Connell had sold to Fitzgerald before the suit was brought, and neither Fitzgerald nor Day were parties to the suit, the jury should

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find for appellee, was not only inapplicable to the case and calculated to mislead the jury, but was also clearly erroneous, and requires a reversal of the judgment.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

SARAH SIMMONS ET AL. V. LEVI H. FISHER ET AL.

1. **PRACTICE IN SUPREME COURT—MOTION.**—A motion, with reference to a suit pending in the Supreme Court, should, when filed at the instance of an attorney for the party in whose behalf it is made, be signed by him. No uniform rule having been established on this subject by the court, a motion not signed is considered, which contains in the body of the motion the name of the counsel and indicates the parties for whom he appears.
2. **WRIT OF ERROR—LIMITATION—MARRIED WOMEN.**—A motion was made to dismiss a writ of error because the same was sued out more than two years after the date of the judgment. The petition in error alleged that one of the plaintiffs in error, who was a married woman, had continued a *feme covert* until the suing out of the writ, and that her co-defendant in the court below died before the date of the judgment, leaving two minor children, who remained minors until married, in less than two years before suing out the writ, which statements were not contested: *Held*, 1, That, even had it been shown that those who were alleged to have been minors were not such, the petition in error could be maintained by the *feme covert* and her husband; the statute of limitation did not run against her during marriage; 2, that one of two or more defendants in a judgment may sue out a writ of error.
3. **WRIT OF ERROR MAY BE SUED OUT BY HEIRS.**—Though there is no statute expressly authorizing the widow and heirs, or an administrator of the estate of a party to a judgment, who dies, to sue out a writ of error, the right exists as resulting from the right of appeal, which is secured by law. In the absence of a statute prescribing an appropriate mode of obtaining a review of proceedings on appeal, it is competent for the court to supply the deficiency by adopting proper rules upon the subject.
4. **PRACTICE IN SUPREME COURT—JURISDICTION.**—When facts are stated in a petition in error which are contested by answer of the

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- opposite party, the Supreme Court has power, under sec. 2, art. V of the Constitution of 1876, to hear affidavits on which it can properly determine the exercise of its own jurisdiction.
5. **WRIT OF ERROR—PRACTICE IN SUPREME COURT.**—When the widow of one against whom judgment has been rendered in the District Court refuses to join her children and heirs in applying for a writ of error, there is no impropriety in her being made a defendant by the heirs.
6. **SERVICE OF WRIT OF ERROR.**—The act of March 15, 1875, entitled "An act prescribing the mode of service in certain cases," is general in its provisions regarding the mode of making service on non-resident defendants, and applies as well to service of writs of error as to ordinary suits. The person making service and affidavit under the provisions of that act will be presumed to have been a "competent person," in the absence of anything to the contrary.
7. **JUDGMENT.**—A judgment rendered by agreement between the plaintiffs and intervenor, which undertook to divide between them the land in controversy, to which agreement the defendant was not a party, he having no legal notice of intervenor's claim, will be reversed for obvious error.

ERROR from Rains. Tried below before the Hon. Z. Norton.

A. M. Carter and Jones & Henry, for plaintiffs in error.

Booty & Baker, also for plaintiffs in error.

L. D. King, for defendants in error.

ROBERTS, CHIEF JUSTICE.—Sicily Fisher and her husband, Levi H. Fisher, Margaret Fuller and her husband, Thomas W. Fuller, as plaintiffs, brought suit against Sarah Simmons and her husband, John W. Simmons, and James T. Wafer, as defendants, in which was prayed a partition of a league and labor of land, except six hundred acres out of the south-east corner, (which had been previously conveyed to Robert Coats,) which belonged to them as the heirs of Mabrey Wafer, deceased, whose surviving children and heirs were said Sicily, Margaret, Sarah, and James T.

Service was obtained on Sarah Simmons and her husband

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by citation, in Panola county, and on James T. Wafer by publication, as a resident of Louisiana.

The suit was brought on the 1st of February, 1871. On the 20th of March, 1872, Levi H. Fisher filed an amended petition, claiming the interest of James T. Wafer, making an exhibit of his deed of conveyance. On the same day Thomas Cain intervened, by leave of court, claiming one thousand acres of land, as the interest of Sarah Simmons, derived through James T. Wafer, making an exhibit of his title, in which, however, there was one link in the chain of title wanting. There was no service of this amended petition and intervention upon the defendants, nor did either of them appear in person or by attorney in the case.

On the same day (20th of March, 1872) the attorneys of Levi H. Fisher, Sicily Fisher, Margaret and Thomas W. Fuller, and Thomas Cain made and filed an agreement, in which the land, except that alleged to belong to Coats, was divided between them, giving Cain one thousand acres and the balance equally to Levi H., Sicily, and Margaret, and leaving the original defendants out entirely.

At the March Term, 1872, a judgment was rendered according to said agreement, appointing commissioners to divide the land, who having made their report, a final decree of partition was rendered on the 18th of November, 1872.

More than two years afterwards, to wit: on the 6th day of August, 1875, a petition for a writ of error was filed by Sarah and John W. Simmons, Letitia Smith and her husband, and Eliza Armstrong and her husband, claiming to be the heirs of James T. Wafer, who is alleged to have died on the 11th of April, 1871, and who are alleged to have been minors at the date of the judgment, and so continued until their marriage in 1874. The petition in error made the following persons defendants, and asked service to be made on them, to wit: Robert Coats and Thomas Cain, by citation to Rains county; Levi H. Fisher, and Sicily Fisher, and Margaret and Thomas W. Fuller, who are alleged to be residents

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of Louisiana, by citation to their attorneys, W. P. Simmonds, S. S. Weaver, and Clayton Jones, in Hunt county; Levi H. Fisher, as executor of the will of his wife, who died in 1873, and Laura Wafer, widow of James T. Wafer, who did not join as plaintiff, both of whom reside in Louisiana, by a certified copy of the petition in error served personally by some competent person.

The service having been made upon defendants in error in the manner here indicated, a motion was made in this court to dismiss the writ of error, because said service has not been made according to law, and because the right to sue out the writ is barred by the limitation of two years from the date of the judgment, and because some of the plaintiffs in error were not parties in the suit, and showed no interest. Counsel for plaintiffs in error except to this motion, because it is not signed by counsel or by any party to the suit.

After stating the title of the case, the motion commences as follows: "Motion of L. D. King, counsel for Levi H. Fisher and Thomas M. Cain, defendants in error. The above-named defendants in error move the court to dismiss the writ of error in this case, for the following reasons, to wit." It is not signed at the bottom of the motion.

Counsel, in filing motions, briefs, or any other papers in this court, should properly sign their names to them in a way to make themselves responsible for what is stated in them, and so as to leave no doubt as to the parties for whom they appear. This is usually done by subscribing the instrument. In this instance, though not formally done, it was evidently intended by the counsel; that he filed the motion for the parties named. Though we cannot sanction it as the proper mode, still, as there has been no uniform rule followed on the subject, it would be improper now to disregard the motion entirely on account of that informality.

The grounds of the motion are:

1. That the writ of error is barred, being sued out more than two years after the date of the judgment. The judg-

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ment was rendered 18th of November, 1871, and the petition in error was filed on the 6th day of August, 1875.

The answer to this is, that Sarah Simmons was sued as a married woman, and the petitioner in error alleges that she has so continued up to its filing. It also alleges that James T. Wafer, the other defendant, died before the date of the judgment, leaving two minor children, Letitia and Eliza, as his heirs, and that they remained minors until they were married in 1874. The affidavit of Letitia, filed in this court before the motion was made, confirms these allegations, except as to her continuing minority, which is left in doubt from her sworn statement. Besides, these allegations in the petition in error, to make parties in this court, are not contested by the defendants in error so as to raise an issue of fact upon them.

Had it been shown affirmatively that Letitia and Eliza were not minors as alleged, still, Sarah Simmons, being a married woman, the petition in error could be maintained by her and her husband, as the statute of limitations could not run as to her during her coverture, as it is expressly provided in the act of 1846, (Paschal's Dig., art. 1496,) relating to proceedings in the District Court, as well as in the act of limitations of 1841. (Paschal's Dig., arts. 4616, 4617.)

That one of two or more defendants in a judgment may sue out a writ of error has often been held by this court. (Burleson v. Henderson, 4 Tex., 60.) In this connection may also be considered the second and third grounds of the motion, which are, that Letitia and Eliza, the children, and Laura, the widow of James T. Wafer, were not parties to the suit, and they are not shown to have any interest in it. The petition in error not only states that they are the only heirs and the widow of James T. Wafer, but that his estate had never been administered upon.

There is no statute in this State expressly authorizing the widow and heirs, or an administrator of the estate of a party to a judgment, who dies, to sue out a writ of error. Such,

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notwithstanding, has been the practice which has been sanctioned by the decisions of this court from an early period. It is said that the right of appeal being secured by law in the absence of a statute prescribing an appropriate mode of attaining that right, it is competent for the court to supply the deficiency by adopting proper rules upon the subject. (*Wheeler v. The State*, 8 Tex., 230; *Teas v. Robinson*, 11 Tex., 774.) If, in pursuing this course, facts are stated in the petition in error, which are contested by an answer of the opposite party, this court has power under the Constitution to hear affidavits upon which it can properly determine the exercise of its jurisdiction in any such case. (Sec. 2, art. V, Con., 1876.) Letitia and Eliza, with their husbands, appear, therefore, to have been properly made plaintiffs; and if Laura, the widow, did not choose to join as a plaintiff, we see no impropriety in citing her as a defendant.

4. "That service of citation directed to and served upon the attorney of the Fishers and Fullers, was not sufficient."

There certainly could be no use in directing the citation in error to be served upon parties alleged to be non-residents, both in the original petition and in the petition in error. (*Paschal's Dig.*, art. 1496; *Holloman v. Middleton*, 23 Tex., 537.)

5 and 6. "That there was no sufficient service on Laura Wafer and on Levi H. Fisher, as executor of the will of his wife, Sicily Fisher," who is alleged to have died in 1873.

The mode in which service was attempted to be made upon these non-resident parties was by asking for certified copies of the petition in error to be issued, to be personally served by a competent person, and by filing in the District Court an affidavit of H. W. Lewis (in case of Levi H. Fisher) and of W. A. Smith (in case of Laura Wafer), headed with the title of the case, and "State of Texas, Panola county," stating the time and place when and where a certified copy of the petition in error was delivered in person to the party, and concluding, "sworn to and subscribed before me this

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the 4th day of September, 1875, A. J. Baker, J. P., P. Co., T." This is the substance of one affidavit, and the other, as to service on Laura Wafer, is similar, except that it omits "The State of Texas, Panola county," at the top.

To this it was objected, that no writ was served informing the party of the time and place of holding the Supreme Court, and there is no evidence that it was served by a competent person, and the court cannot know that Baker was a justice of the peace in Panola county, Texas.

The act relating to writs of error provides, that when a party to be cited is a non-resident, service may be had upon his attorney of record in the case. (Paschal's Dig., art. 1496.) Laura Wafer had no attorney, and Sicily Fisher died in Louisiana in 1873. She had attorneys here while she was living, who were served, and in the absence of any other provision to obtain service, it might, from the necessity of the case, be regarded that her attorneys, who brought the suit, might in this matter still act for her legal representatives.

This service, however, was attempted to be made under a recent statute, (Acts of 1875, 15th March, p. 170) entitled "An act prescribing the mode of service in certain cases," in which it is provided, "that service of certified copy of petition, by any person competent to make oath of the fact, upon any absent or non-resident defendant, may be made outside of the limits of this State, and the oath of the party making such service shall be sufficient return. The return shall show when and where the said copy was delivered to the defendant." This provision is general, and may apply as well to service in writs of error as in ordinary suits, and as well to one court as to another. This has been substantially complied with in this case. There is enough in the affidavit to inform the court that it was made before an officer in Texas authorized to administer oaths, and the person who made the affidavit must be presumed to have been a competent person, in the absence of anything to the contrary. The affidavit states in the terms of the statute that a certified copy of the

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petition in error in this case was delivered to the party, and when and where it was done. The petition states the time and place of holding the Supreme Court. The motion to dismiss will be overruled.

As to the merits of this case, the error in the judgment is so obvious and fundamental as to require no further consideration than a short statement. Two persons, as heirs of an estate, bring suit against, and get service upon, two other heirs of the same estate, for a partition of a tract of land belonging to them all, equally and jointly. Afterwards, two other persons intervene in the suit, claiming the interests of the two defendants, and, without giving to defendants any legal notice of their claim thus filed, make an agreement with the plaintiffs to divide the land with them. The defendants had never appeared in person, or by attorney, in the case. The court rendered a judgment and decree upon, and in accordance with, said agreement, dropping the defendants from the case, and decreeing their interests in the land to the intervenors, not noticing them so much as to render a judgment by default against them.

REVERSED AND REMANDED.

HOUSTON AND G. N. R. R. Co. v. JOHN JONES.

1. COSTS, HOW TAXED—WITNESS.—The amount due each witness for attendance in a suit, should be separately taxed, and thus carried into the bill of costs accompanying the execution, so as to give the defendant each item of costs he is required to pay.
2. COSTS—CERTIFICATE.—The certificate given by the clerk, on the oath of a witness, showing the amount due him for attendance on a cause, is not an adjudication any more than the taxing of costs in the fee-book would be, but they are both modes, prescribed by law, for the authentication of a claim, which is *prima facie* evidence of its correctness, when done, upon which suit may be brought against the party who summoned him, without waiting for the termination of the suit. If the party who procured the witness to be summoned

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should pay his certificate, the possession of it, receipted, would be evidence of his right to receive the money when collected from the party against whom the judgment for costs is rendered.

3. COSTS OF SUIT—TAXATION OF.—At a term of court, after judgment, the court, on motion of the party against whom costs had been adjudged, ordered a retaxation of the costs, excluding certain witness fees for informality of taxation; the costs were immediately paid to the clerk as retaxed; after this, during the same term, the costs were, on motion, again adjudged to be retaxed, so as to include the witness fees, the informality of the first taxation having been cured by the affidavits of the witnesses and the clerk's certificate. There was no effort made to show that the charges of the witnesses were excessive or unfounded: *Held*, That the payment of the costs under the first order did not preclude the subsequent judgment, which must be held, in the absence of testimony contradicting the clerk's certificate and the affidavits of the witnesses, to be correct.
4. APPROVED, *Flores v. Thorn*, 8 Tex., 381.
5. DISTINGUISHED.—This case distinguished from *Hardy v. DeLeon*, 7 Tex., 467.

APPEAL from Smith. Tried below before the Hon. M. H. Bonner.

H. M. Whitaker, for appellant.—It cannot be denied but that the execution was fully satisfied before the witnesses proved up their attendance and mileage, because, by an order of the court, the fees taxed by the clerk were stricken out and disallowed, which placed the cost bill, and execution thereon, in the same condition as if these fees had never been taxed; at which time the defendants paid the balance due. In such a case, no one would contend that execution could have issued for the fees of the witnesses, neither will any deny but that the defendants (as was done) had a right to satisfy the execution against them; and, if so, it seems directly contrary to reason and authority to claim that these fees could afterwards be taxed against defendants, else when could any litigant feel secure against executions for costs in a case in which he may have been the loser?

As to the 3d assignment of error, we claim that the same particularity is required in accounts of witnesses for fees as

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in other accounts upon which judgment is rendered and execution issued, because they stand in the same attitude. But in no particular whatever do the claims of the witnesses in the present case comply with the requirements of law, applying the same rule as to accounts generally; they do not state the date of attendance, at what term or terms of the court they attended, the number of days at each term, and the number of miles traveled. (*Harris v. Coleman*, 8 Tex., 287; *Gause v. Edminton*, 35 Tex., 69.)

Stephen Reeves, for appellee.—It is insisted that there was no execution out at the time the affidavits of the witnesses were made, and the fact of this defendant paying off the balance of the costs as soon as the first motion was sustained, and before the plaintiff could procure the affidavits of the witnesses, and file his motion to retax and allow said witnesses' fees, and before court adjourned, was a fraud upon the rights of the plaintiff, and not in keeping with the written agreement filed. If such a course of sharp practice be allowed by the court, then any party cast in a suit might, as soon as judgment should be rendered against him, go to the clerk and pay the costs that were taxed, and thereby deprive the other party of his fees for his witnesses. It is not believed to be the law of the case.

Admitting, for argument sake, that the witness must make his claim for his fees before execution issues, yet it would not follow, that if the witness went before the clerk, and through mistake or inadvertence of the clerk the affidavit should be imperfect, the witness should thereby lose his fees, when he comes forward as soon as the mistake or inadvertence is discovered, and cures the defect by making the proper affidavit. In this case the defendant, by its agreement with the plaintiff, agreed to pay all costs, including witness fees.

It is insisted that the judgment of the court below, ordering the witnesses' fees to be taxed and collected, should be affirmed.

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ROBERTS, CHIEF JUSTICE.—Appellee recovered a judgment, which was rendered, by agreement of counsel, on the 28th of May, 1875, against appellant, for all the cost of a suit.

An execution was issued for the sum of \$170.67, the cost of suit, with a fee bill attached, in which there was a charge of "Witnesses, \$153.42."

The defendant filed a motion on June 15, 1875, to retax the cost, and disallow the fees of the three witnesses, amounting to said sum of \$153.42, because the amounts charged were excessive, and because three witnesses were summoned to prove the same facts.

There was a levy on property, which was not sold for want of time, as returned by the sheriff. The court met on the 6th of September, 1875, and on the 10th of the same month the defendant filed an additional motion, upon the grounds that there were no affidavits of the witnesses proving their claims, nor certificates of clerk, filed among the papers of the cause; that the items of account were not distinctly and separately stated, and that the witnesses made no affidavits of the correctness of the fees claimed by them.

On the day afterwards, the clerk issued certificates to the three witnesses, and on the 17th of the same month the court, in pursuance of the motion, entered a judgment, retaxing the cost, and disallowed the said witness fees.

Thereupon defendant paid to the clerk the balance of the cost, (\$28.50.) On the next day the plaintiff made a motion to the court to reconsider the judgment thus rendered, and allow the witness fees, as originally charged in the execution; the witnesses made affidavits stating the time of their attendance in said cause as witnesses, and the distance which they traveled in attending court, but did not state the number of days of the respective terms during which they attended court.

The court at the same term, to wit, on the 28th of September, 1875, heard this motion. There was no evidence before the court tending to show that the witnesses had not attended

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as witnesses in the case for the time specified in the clerk's certificate, and in their affidavits. The court entered a judgment sustaining the plaintiffs' motion, and ordered the witnesses' fees to be taxed in the bill of costs, and collected, to which the defendant excepted, and gave notice of appeal to the Supreme Court.

The ground upon which counsel for defendant seem to rely is, that, as the witness fees were improperly taxed in the bill of costs, and included in the execution, as soon as they were disallowed on their motion, and the balance of the cost was paid, the case stood as though the execution had issued without the witness fees being included in it, and the execution being returned, and the balance of the cost being paid, the whole matter relating to the suit was irrevocably concluded.

There was no evidence to show how it happened that the exact amount of witness fees that was afterwards sworn to by the witnesses was taxed in the bill of costs, and included in the execution. It may be that the clerk swore the witnesses, at the end of the suit, as to their mileage, and time of attendance, and then, during court, taxed the amount in the bill of costs, intending to issue the proper certificates afterwards, which was neglected, or not asked to be done. Witnesses are often, when a suit is continued, or ended, urgent in their applications for their certificates of attendance, so as to leave for their homes, while the clerk is busy in his attention to the next case, or otherwise, and in the press of business the witnesses are sworn, the amounts of their fees are taken down by the clerk, and the witnesses thus disposed of for the time. In some such way, we may presume, the clerk knew what amount of witness fees to tax and insert in the bill of costs when no corresponding certificates had been issued. This is an informal mode of taxing cost in a case, that should not be followed. Its informality is increased when the fees of three witnesses are taxed in one gross sum, as was done in this case. Under such circumstances the defendant might well make a motion to have the charge inquired into and disal-

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lowed; for certainly the charge of each witness should be separately taxed, and thus carried into the bill of costs accompanying the execution, so as to give the defendant notice of that, as well as the other items of cost that he was called on to pay.

The statute provides that witnesses shall be allowed certain compensation, "which shall be paid, on the certificate of the clerk, by the party summoning them, which certificate shall be given on the affidavit of the witness before the clerk; and such compensation and mileage of witnesses shall be taxed in the bill of costs against the party cast." (Paschal's Dig., art. 3724.) The proof required to establish the witness's claim of compensation is his own oath before the clerk. Upon that proof being made, the clerk is authorized and required to do two things, to wit: to tax it in the bill of costs, in the fee-book kept for that purpose, and to give to the witness a corresponding certificate, showing that the oath has been taken, the time of attendance, and the mileage, with the amount due therefor. This certificate is the property of the witness, to be kept by him as the evidence of his claim for compensation. It is not an adjudication, any more than the taxing of it as cost in the fee-book is, but they are both modes prescribed by law for the authentication of a claim, which is *prima facie* evidence of its correctness, when done. (Flores v. Thorn, 8 Tex., 377.)

The certificate is *prima facie* evidence against the party that summoned him, and he may sue him on it without waiting for the termination of the suit. (Ib., 8 Tex., 377.) If, however, the witness retains it until the suit is ended, and the cost is collected, as is most usually done in practice, it is authority to receive the amount that is called for from the sheriff, or clerk, in whose hands the money is found. Or if the party who summoned him should pay it, and lift it as a note held against him, the amount collected should be paid to him, and his possession of the certificate receipted would be his evidence of his right to receive the amount. This

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seems to be most consistent with what is contemplated by our statute, and most in harmony with principle, as it was indicated in an early decision of this court, by Justice Lipscomb, in *Flores v. Thorn*, 8 Tex., 381. The most usual practice, however, is to pay but little attention to this certificate, after it is issued, and generally, officers having the money collected, pay the witnesses upon their receipt, according to the fee-bill, without calling for the certificate, which habit is liable to produce difficulties in settling up a case, and is well calculated to cause all parties concerned to lose sight of the real object of the certificate, which is designed to be an authenticated claim, a chose in action, to be held as *prima facie* evidence of debt by the person to whom it belongs, until it is paid in the hands of the party summoning the witness, most properly after he has paid it, or if he has not, in the hands of the witness for whom it is his duty to collect it, being bound to pay it. The taxation of the costs, at the end of the suit, against the party cast, by the clerk, not being an adjudication but an authentication of a claim of costs in the case, in the records of his office, is only *prima facie* evidence of its correctness as against the party cast in the suit. When it is properly carried into the bill of costs, accompanying the execution, the party cast may have notice of it, if he has not already obtained such notice, (which he may get,) by inspection of the fee-book, in the clerk's office; and if he finds it informally taxed, as in this case, so as not to give him proper notice of the charges which he is called on to pay, or if he deems them excessive or unfounded, as defendant alleged in this case, he may make issues of law or fact, or both, thereon, in a motion to retax the cost. This he might do, at the return term of the execution, even if he had paid the money to the sheriff. In such case it might be proper to give notice to the sheriff to retain the money until he could make the motion. The opposite party would be the proper person to make defense against this motion; for, whether he had paid the

amount charged to the witness or not, he would be liable for it to his witness, if it should be a just claim.

Upon the issues formed by the parties to the suit, on this motion, the court would hear evidence of record, and otherwise, pertinent thereto, and render judgment thereon. In such adjudication any mere informality in the clerk, in taxing the witness fees, or in issuing the certificate, would not be a good ground for preventing the successful party from collecting his witness fees.

It would seem equally proper to allow the successful party to make a motion to retax the cost, if made in a reasonable time, upon any informality, or omission of the clerk in properly taxing the cost in his favor, against the party cast. The taxation of the cost, and the issuing of the certificate to the witness, are official acts of the clerk, over which the parties to the suit have no absolute control. If he has been applied to properly to perform any such duty, and has failed by mistake, negligence, or omission to perform it correctly, there is no remedy left to the party but to appeal to the court to correct the failure. That is the purport and purpose of a motion to retax the cost.

The statute does not state the time when the clerk shall give the certificate upon the affidavit of the witness, nor when he shall tax it in the bill of costs, or tax the cost against the party cast in the suit.

Justice Wheeler, in noticing this fact, says: "On general principles, the fees must be claimed and taxed before the issuing of execution, but the law does not require that this be done before the expiration of the term of the court at which the case was tried. In this case the fees were taxed after the adjournment of the court, but before execution issued. The District Court adjudged them rightly taxed." (*Hardy v. De Leon*, 7 Tex., 467.)

This is certainly a correct general rule, because, a suit being ended, the execution should contain everything demanded of the party cast, so that when paid, a finality should be reached,

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and it should require equitable circumstances to open a case that had thus been closed. But that is not the case before us now. Upon the motion of the defendant, the court ordered a retaxation of the cost, excluding the witness fees, from the informality of the taxation, apparent in the bill of costs accompanying the execution, as we may presume. At the same term, the judgment, still being under the control of the court, upon motion of the plaintiff, and upon additional evidence adduced, was set aside, and the witness fees allowed for the same amount originally taxed by the clerk, as appears from the bill of costs accompanying the execution. After the affidavits of the witnesses and the certificates of the clerk were presented in confirmation of the correctness of the original taxation as to amount, informally made by the clerk, there was no effort made on the part of the defendant to show that the charges of the witnesses were either excessive or unfounded. The effect of the ruling of the court was to permit the informal taxation originally made by the clerk to be cured by the witnesses' affidavits and the clerk's certificates, made after the motion of defendant objecting to the taxation. That made a *prima facie* case, which, not being contested on the merits, justified the judgment of the court as rendered.

Judgment affirmed.

AFFIRMED.

P. J. HENDRIX v. Q. J. NUNN ET AL.

1. **TRUSTEE IN INVITUM.**—It is a common and familiar application of "their remedial justice" for courts of equity to force upon the conscience of a party the duty of a trustee in regard to property which has been acquired by artifice or fraud, and where, either from the character of the property or the circumstances under which it is acquired or held, it would be against equity to permit such party to hold it except as trustee.
2. **SAME.**—The cases where such relief is granted are, generally, where there has been some breach of duty or want of good faith and fair

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dealing on the part of the person acquiring the property, or of him from whom or under whom he has obtained it, of which he has actual or constructive notice; or, where the property has been acquired or possession of it taken on the assumption of a trust character, or under the belief by those with whom the transaction is had, or by reason of which it was acquired or possessed, that it was taken or acquired in trust; or, where it has been obtained by some undue influence.

3. **SAME.**—See this case for allegations held insufficient to charge defendant as such trustee.
4. **SAME.**—See facts held insufficient to authorize such relief against the defendant.
5. **FRAUD.**—Allegations of fraud must specify the acts insisted on as fraudulent.

APPEAL from Wood. Tried below before the Hon. Z. Norton.

On the 9th of February, 1850, a certificate for a league and labor of land, No. 1421-1520, issued to Charles T. Stanley. On the 27th of December, 1851, Stanley mortgaged said certificate to Larkin Hendrix and B. F. Pace. On the 8th of October, 1853, Stanley had surveyed by said certificate one league of land in Wood county; but whether the field-notes were returned to the General Land Office is not shown. The land so conveyed was covered by an older valid claim, having been titled to William Barnhill October 14, 1835.

In 1855 suit was brought by Hendrix and Pace against Charles T. Stanley to foreclose their mortgage on said certificate. During the pendency of this suit, in 1856, Stanley died testate, and by his will, which was probated in Wood county, the league of land in Wood county, surveyed under said certificate, was bequeathed to his wife, Sarah Stanley, who was appointed sole executrix. Sarah Stanley gave bond and qualified, and at the February Term, 1857, of the District Court, made herself a party defendant in said suit of Hendrix and Pace v. Charles T. Stanley, being cause No. 126.

At the August Term, 1857, of the District Court, judgment was rendered in said cause in favor of Hendrix and Pace and against Sarah Stanley, administratrix of Charles T. Stanley, deceased, for \$1,273.02½, and foreclosing plaintiff's mortgage

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on said certificate, ordering the same to be sold as under execution.

On the 19th of October, 1857, an order of sale issued on said judgment, directed to the sheriff of Travis county, and said sheriff levied upon said certificate, and sold the same as under execution to R. M. Johnson and Larkin Hendrix for \$476.20, which amount was credited upon said judgment. The sheriff executed a deed, and delivered the certificate to Johnson and Hendrix.

One labor of said certificate had been sold by Stanley before executing the mortgage to Hendrix and Pace.

In February, 1858, the heirs of William Barnhill, who held the superior title to the land in Wood county, brought suit in the District Court of Wood county against their co-heirs for partition, and against Sarah Stanley, J. M. Lloyd, and Thomas Etheredge as trespassers. Sarah Stanley was served with citation in October, 1858, and appeared by counsel and answered, said suit being No. 264.

At the Spring Term, 1860, Larkin Hendrix intervened and had himself made a defendant, claiming title under the Stanley certificate.

On the 12th of March, 1867, R. M. Johnson conveyed to Larkin Hendrix all his interest in said certificate. At the Fall Term, 1867, of the District Court, a judgment was rendered in said cause No. 264, adjudicating the rights and interests of the several parties in and to the land and the said Stanley certificate, and ordering partition.

Partition was made, and reported, and at the Fall Term, 1868, a final judgment was rendered in the cause, giving Sarah Stanley one hundred and sixty acres of land, giving the land now sued for to Larkin Hendrix, and dividing the Stanley certificate between Hendrix and the heirs of William Barnhill. Thus matters were on the 24th day of September, A. D. 1873, when appellees instituted suit in the District Court of Wood county against Larkin Hendrix. The petition charged that Charles T. Stanley, at his death, was the owner of a

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headright league and labor of land certificate, which, on October 8, 1853, he had located on lands in Wood county; that the survey had been made thereon, and the field-notes, with certificate, duly returned to the General Land Office.

That said location was community property of the said deceased and his widow, Sarah Stanley, and plaintiffs claim as heirs of said Charles T. and Sarah Stanley.

That on October 1, 1858, suit for partition was brought by part of the heirs of William Barnhill against their co-heirs, Lloyd and Mrs. Sarah Stanley, being No. 264.

That in this suit, May 16, 1867, an agreement was made between the heirs of William Barnhill and Hendrix, dividing the land so covered by the Stanley certificate, the agreement being to the effect that Hendrix was to be equally interested in the land held by the Barnhill title, and that the Barnhill heirs were to share equally with Hendrix in the Stanley league certificate—protecting, however, Lloyd and Mrs. Stanley in their improvements, &c.; that thereafter judgment was rendered, a commission appointed to make partition, whose report was confirmed, in which 2,100 acres of the Barnhill land (also covered by the Stanley location) was adjudged to Hendrix, of which, however, 235 acres were allotted to Lloyd and 160 acres to Mrs. Sarah Stanley.

That at the rendition of this judgment Hendrix had no title or interest in the Stanley certificate, nor in the survey made therein, and that “all his pretensions of right thereto and his actions therein were in fraud of the rights of petitioners.”

Plaintiffs claimed all the land set apart in the partition to Hendrix, except that allotted to Lloyd and Mrs. Sarah Stanley, and one half of all lands secured by the Stanley certificate elsewhere; also \$1,600, the alleged value of the land wrongfully conveyed by Hendrix to Lloyd.

By amendment, June 22, 1874, plaintiffs alleged that at the time Hendrix assumed to control the said Stanley certificate he had no right or title thereto, nor had he subsequently

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acquired any right therein, or to the land located by said certificate; and that all his (defendant's) acts in that behalf were fraudulent as to these petitioners, and in law and equity are held and deemed to have been acts done in trust for petitioners and their use and benefit. This amendment contained a description of lands located by Hendrix by virtue of the Stanley certificate, for half of which judgment was asked.

By further amendment, February 26, 1875, plaintiffs alleged that their mother, Sarah Stanley, up to her death, was induced, by the false and fraudulent representations of Hendrix, to believe that he had a good title to the Stanley certificate and land located by virtue of it; that the false and invalid claim of Hendrix was fraudulently concealed from Mrs. Sarah Stanley during her life, and from plaintiffs until a short time before the filing of the suit herein; that plaintiffs reside out of the county, have little education or experience in affairs, no legal knowledge, and did not know how to help themselves against the fraudulent acts of Hendrix; that Hendrix was a shrewd and unscrupulous man, and had the ability to make his neighbors believe that he owned the said property of plaintiffs which he had in possession, from which they were discouraged from investigating their rights in the same; that he declared everywhere in the region in which he and plaintiffs resided, that he had a good title to said property; and that plaintiffs never did discover the fraud of Hendrix "until they had a conversation with Winston Banks, one of the attorneys for plaintiffs in this cause, three or four months before the institution of this suit."

The defendants demurred and excepted to the sufficiency of the petition, pleaded a general denial, statute of limitations, suggested improvements in good faith, and expenses about the property in locating the certificate, &c.

The jury found the following verdict: "We, the jury, find for the plaintiff all the lands claimed by plaintiffs lying in Wood county, except the Lloyd tract; also all lands claimed

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by plaintiffs in Cooke and Clay counties, except one fourth undivided interest in said lands.

"We, the jury, find for defendant the Lloyd tract of land in Wood county, in lieu of the value of improvements made in said county on lands claimed by plaintiffs by said defendant; also one fourth interest in the land located in Cook and Clay counties, as compensation for locating and other expenses."

Upon which, judgment was rendered. •Motion for new trial was overruled, and defendant appealed.

Payne & Putman, for appellants, cited Kerr on Frauds, 365; State v. Galveston City Co., 38 Tex., 12; Morton v. Welborn, 21 Tex., 774; Roberts v. Frisby, 38 Tex., 219.

Banks & Crow, for appellees, cited 2 Story's Eq. Jur., §1255, 1262, 1265; Barziza v. Story, 39 Tex., 355; Spurlock v. Sullivan, 36 Tex., 511; Cunningham v. Taylor, 20 Tex., 129; Robertson v. Paul, 16 Tex., 472; Boggess v. Lilly, 18 Tex., 205; Ripley v. Witbee, 27 Tex., 14; Anding v. Perkins, 29 Tex., 354; Emerson v. Navarro, 31 Tex., 340; Robinson v. Davenport & Tinsley, 40 Tex., 337.

MOORE, ASSOCIATE JUSTICE.—The theory upon which this suit was brought is, that Larkin Hendrix, appellant's testator, took the land set apart to him by the decree of the District Court in the case of Barnhill's Heirs v. Barnhill's Heirs, as a trustee *in invitum* for Sarah Stanley, the widow, legatee and executrix of Charles T. Stanley, deceased, or for her and plaintiff's, appellees, in this court, as the legal and equitable owners of the headright certificate for a league and labor of land, issued to said Charles T. Stanley. It was not the purpose of this suit to review and impeach or annul the judgment in the case of Barnhill's Heirs v. Barnhill's Heirs, and to show that plaintiffs had the superior title to the land granted to William Barnhill by virtue of its survey on the Stanleys certificate, or to assert a title to the land subse-

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quently appropriated by this certificate, as the owners of it, by inheritance from their mother, or under the recommendatory trust in their father's will, if such is its proper construction. Whatever imperfections there may be in this judgment, or whatever rights appellees might have heretofore or may hereafter assert to either of these tracts of land under the certificate issued to their father, they are not in question in this case. Appellees, by their pleading, in effect admit the validity of the Barnhill title, and the finality and correctness of the decree, and base their right to relief solely upon it and the fact that appellant's testator took, as they assert, the land set apart to him by the decree of the court as constructive trustee, *de son tort*, for themselves or mother, as the *bona fide* owner of the Charles T. Stanley certificate. Unless, therefore, the averments in the petition and amended petitions are sufficient so maintain this claim, and the evidence warrants the verdict against appellant, the action of the court in overruling the exceptions to the petition, and the refusal to grant a new trial, were erroneous. A careful examination of the record satisfies us that on both of these grounds, if no others, the judgment must be reversed.

Courts of equity, as says Judge Story, have adopted principles in regard to fraud, whether constructive or actual, exceedingly broad and comprehensive in the application of their remedial justice, and, especially where there is fraud concerning property, they will often interfere and administer a wholesome and sometimes even a strict justice in favor of innocent persons, who are themselves without fault in the transaction. (Story's Eq. Jur., sec. 1265.) And it is unquestionably a common and familiar application of "their remedial justice" for courts of equity to force upon the conscience of a party the duty of a trustee in regard to property which has been acquired by artifice or fraud, and where, either from the character of the property or the circumstances under which it is acquired or held, it would be against equity to permit such party to hold it, except as a trustee.

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It is evidently impossible to announce a formula which is applicable to, and that will embrace, every conceivable case in which a court of equity will hold a party to be a constructive trustee. It will be found, however, upon examination, that the cases to which this doctrine has been held applicable in the "remedial justice" of courts of equity, are generally cases where there is some breach of duty or want of good faith and fair dealing on the part of the person acquiring the property, or of him from whom or under whom he has gotten it, of which he has actual or constructive notice; or where the property has been acquired or possession of it taken on the assumption of a trust character, or under the belief by those with whom the transaction is had, or by reason of which it was acquired or possessed, that it was taken or acquired in trust; or where it has been gotten by some undue influence. (2 Wash. on Real Prop., 447, 451; Hill on Trustees, 242, 246; Story's Eq. Jur., sec. 1255, *et seq.*; 2 White & T.'s Lead. Cases in Eq., vol. 2, part 1, 549.) But certainly it would be altogether fallacious to suppose that in any case in which there was fraud, even though fully sufficient to annul the contract or warrant the granting of other appropriate relief, that the party guilty of the fraud can be regarded or treated as strictly a trustee, as appellees are in effect seeking to do in this case. To so hold, would abrogate the statute of limitations, and virtually reopen and render of no avail in many instances the previous judgments of the courts.

When the plaintiff seeks to impose upon the defendant the character of a trustee *in invitum*, evidently he must allege in his petition facts from which the court can see that equity and justice require that it should force upon defendant's conscience the performance of that which is demanded of him. The facts alleged in the original petition, from which it is insisted appellant's testator took the lands decreed him in the Barnhill suit as a trustee, are in substance: that without residing on it, and without alleging any right, title, or interest in the land surveyed for Charles T. Stanley in his lifetime,

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he had himself made a party defendant; that prior to the making of the agreement for the compromise of said suit, and without petitioner's consent or the consent of said Sarah Stanley, he illegally conveyed a part of said land to J. M. Lloyd; that at the making of said agreement, and at no time previous thereto or afterwards, was said Hendrix in any way interested in said Charles T. Stanley's certificate, or the survey made by virtue thereof, and all his pretensions of right thereto were in fraud of the rights of petitioners.

Evidently, it is not shown by these averments that any fraud was practiced by Hendrix on plaintiffs, or their mother, who was a party to the suit. There is merely a bald assertion of fraud, as an inference or conclusion, instead of the statement of facts showing fraud, as is unquestionably necessary. The most that can be said is, that it may be inferred from these averments that there may have been irregularities in the proceeding, or error in the judgment, but as Mrs. Stanley was a party in this case, and plaintiffs' action is founded upon the judgment, this is of no consequence here.

The obvious deficiency of the original petition, in alleging the facts relied upon, to charge Hendrix with fraud, and justify the court in holding him to have taken the land decreed to him in trust, is evidently not cured by the amended petitions. In the first amendment, plaintiffs merely assert that Hendrix, at the time he first assumed to control the lands located and surveyed by virtue of the Stanley certificate, had no legal interest, title, or claim to such land or said certificate, nor had he any right, title, or claim thereto from that time hitherto, and that all his acts were fraudulent as to petitioners.

And, in replication to defendants' answer, plaintiff says that Hendrix took possession of the land and certificate mentioned in defendants' first and second amended answers, fraudulently, and under color of a pretended title, which was wholly invalid; that they had no knowledge of such fraudulent and illegal acts, and supposed the pretended claim of the

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defendants to be valid until some three months before the commencement of their suit.

Again, they say: the said Sarah Stanley, up to the time of her death, was induced, by false and fraudulent representations of Hendrix, to believe that he had a good title to the Stanley certificate and the land surveyed by it, and that the false and invalid claim, under which he assumed to possess and control the same, was fraudulently concealed from her during her life, and from plaintiffs until the time previously alleged. But what these representations were, or how his claim to the certificate and land was concealed, is not stated.

In the last amended petition and replication they say that Hendrix was an unscrupulous man, and possessed the ability to make the neighbors, among whom he and they lived, believe that the property of plaintiffs, which he had in possession, was his, and that they were thereby discouraged and prevented from investigating their right to the same, and that said Hendrix declared, everywhere in the region in which he and plaintiffs lived, that he had a good title to said property, thus negating the averments of the original petition, that Hendrix had caused himself to be made a party to the Barnhill suit, without asserting any interest or title to the land, and that he should therefore be held to have taken the land decreed to him as trustee, while, from this averment in their replication, it plainly appears, if he had so taken it, he nevertheless held in open and notorious repudiation of the trust, which would have justified the court in sustaining the exception to the petition setting up the statute of limitations.

An examination of the statement of facts shows a more glaring deficiency of evidence to establish the essential facts necessary to support the verdict than does the petition of the averments requisite to maintain the action.

On the 27th of December, 1851, Stanley sold one thousand acres of land, described as located by virtue of his headright certificate to Hendrix and Pace, for the sum of seven hundred and fifty dollars; and to secure the repayment of this

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sum, in the event he should be unable to make a valid title to the land sold, gave them a mortgage upon said certificate. Whether the land sold to Hendrix and Pace was a part of the land surveyed by Stanley which had been previously granted to Barnhill is not shown, but as this survey was not made until October 8, 1853, it cannot be inferred that it was. At all events, Hendrix and Pace brought suit against Stanley for a breach in the condition of his bond, and to foreclose the mortgage on the certificate prior to the Fall Term, 1855, of the District Court of Wood county; and Stanley having died testate after the institution of the suit, his executrix, Sarah Stanley, who, if she did not take the absolute title to said certificate by his will, certainly held it for the settlement and discharge of said Stanley's debts, voluntarily appeared and made herself a party; and at the Fall Term, 1857, of said court the cause came regularly to trial, when plaintiffs recovered a judgment, on the verdict of a jury, for twelve hundred and seventy-three dollars and two and a half cents, and for the foreclosure of their mortgage on said certificate, and that an order issue to the sheriff of any county in the State to levy upon and sell the same.

On an order of sale issued in obedience to this judgment, the certificate was levied upon and sold by the sheriff of Travis county, where it seems to have been previously returned, with the field-notes of the land upon which it had been located and surveyed in 1853.

It is unnecessary for us to discuss the validity or invalidity of this judgment, or to determine whether the proceedings under it, by which Hendrix claimed to have acquired the title to the certificate, or the land upon which it had been surveyed, were valid or not. If we concede that the certificate was not subject to the levy while on deposit in the General Land Office, or that it ceased to be a chattel when surveyed, although the land to which it was sought to be applied had been previously appropriated, and that the title to it could only pass by a sale of the realty to which it was

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attached, (if it can be held to have attached to it for any purpose,) and although it should also be admitted that the judgment on the mortgage should have been certified to the Probate Court, instead of ordering a sale by the sheriff, as had been decided a short time before the judgment was rendered, in the case of *Robertson v. Paul*, 16 Tex., 472, overruling what seems to have been the previously established practice, (*Given's Administrator v. Davenport*, 8 Tex., 451,) still, however clearly it may appear that this judgment and the sale under it was wholly inoperative upon the title to the certificate and the land upon which it had been located, it certainly cannot be said that it was fraudulent to purchase at a sale thus made, in pursuance of the judgment of the court, or in claiming to have acquired thereby a valid title to the certificate, or the land to which it had been applied; and especially when a valuable consideration had been paid for it, which went to satisfy the mortgage with which it was charged by appellees' father.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JAMES BURLESON v. LEWIS DURHAM.

1. **STATUTE CONSTRUED.**—Sections 3 and 4 of "An act to regulate the disposal of the public lands of the State of Texas," approved August 12, 1870, discussed and construed.
2. **SAME.**—Section 6, article X, of the Constitution of 1869, construed.
3. **LOCATION—SETTLER'S CLAIM.**—If at the time of a location upon land on which a settler's claim is made, such settler was not so occupying the land as to give him, under the statute approved August 12, 1870, the right to purchase under its provisions, the fact that a patent was afterwards obtained by such settler will not affect the rights of the locator.
4. **SETTLER.**—The word "settle," when applied to lands, conveys the idea of permanent inhabitancy. The settler, protected by the pre-emption laws, was one who actually resided on the land settled.

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5. **SAME—PRE-EMPTION.**—Under said statute, the “settler,” “actual settler,” “*bona fide* settler,” on whom is conferred the privilege of purchasing land of the State, is described in terms similar to those used in the pre-emption laws previously existing; and the statute intends to give such right of purchasing to him only who occupies public land as a residence or with a view to residence.
6. **ACTUAL SETTLER—OCCUPANCY.**—The actual settler must reside on the land, or occupy it, preparatory to and with the *bona fide* intention of residing thereon. Occupancy for such purpose may be occupancy in good faith; occupancy for other purposes, does not entitle the party to purchase as an actual settler.
7. **SAME.**—See facts held insufficient evidence of actual settlement under said statute.

ERROR from Gregg. Tried below before the Hon. Z. Norton.

April 19, 1873, Burleson sued Durham, in the District Court of Upshur county, for five hundred and twenty acres of land, claimed under a location and survey made by virtue of donation warrant No. 100, issued by W. S. Hotchkiss to Simon P. Ford, for six hundred and forty acres.

It was alleged that Durham had cut a great quantity of cord wood on the tract, and was about to remove the same. An injunction was obtained, restraining Durham from cutting or removing wood from the tract pending the suit.

Defendant demurred, and pleaded not guilty.

By consent, October, 1873, the venue was changed to Gregg county.

By amendment, plaintiff alleged that he had located said certificate on 23d November, 1870, and had a survey made on 25th November, and had returned the certificate and field-notes to the General Land Office, as required by law; that the defendant claimed one hundred and sixty acres of the said survey, and had obtained a patent therefor, under section 3 of “An act to regulate the disposal of the public lands of the State of Texas,” approved August 12, 1870; that at the date of the passage of said act, Durham was not a settler on the said land, and that his affidavit designating said land was made July 12, 1871, long after the inception of

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plaintiff's title, and when the land was not subject to appropriation under said act; that defendant had, in fraud of plaintiff's rights, obtained a patent for said one hundred and sixty acres. Plaintiff asked damages for the trespasses by defendant, and that the patent be canceled.

Defendant amending, set up the acquisition of said tract under said act of 12th August, 1870, the grant to him by patent of date June 20, 1873, pleaded in reconvention the value of three hundred cords of wood cut by defendant, and lost by the effect of the injunction, worth twelve hundred dollars, and attorney's fees incurred in defending the suit against the alleged malicious attacks of the plaintiff. By further amendment, defendant pleaded that on August 12, 1870, he occupied said land, and had continued such occupancy up to November 9, 1870, when he caused a survey thereof to be made; made affidavits and proof by supporting witnesses of such occupation July 12, 1871, and obtained the requisite certificate from the surveyor of Upshur county; the surveyor's certificate and field-notes, &c., he caused to be returned to the land office, paying all necessary fees of office and the sum of one dollar per acre; a patent for said land was obtained; that the location by plaintiff was made within twelve weeks after the passage of said act, August 12, 1870, and while the land was occupied by defendant, and so was void.

Plaintiff's evidence showed the location of the Ford certificate on September 17, 1870, survey November 25, 1870, and the return of certificate and field-notes to the General Land Office of the 520 acres described in the petition; transfer from Ford to plaintiff of the certificate.

T. C. Gillespie, for plaintiff, testified that he, as agent, had located the land for Burleson; was present when it was surveyed; conversed with Durham on that day, and he said he did not know the land was public domain; that two or three months later, witness seeing Durham trespassing on the land, cautioned him that the land belonged to Burleson, forbidding him from further trespassing; whereupon Durham promised

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to cease, and would satisfy Burleson for the damages done. In May, 1873, witness was on the land, and saw that nearly all the timber—pine as well as oak—had been cut off; that fifty acres of the tract was a very fine pinery, averaging fifteen sawing pines to the acre, and worth fifty cents a pine; that there were from 300 to 500 cords wood cut, worth \$3 per cord; that there was no settlement on the land, “as he could see;” that Durham was running a steam saw-mill, one post or corner of which was on the 160 acres now claimed; that there were several huts east of the mill, on another tract, in which the hands running the mill lived.

W. H. Payne, for plaintiff, stated that he also acted as agent for Burleson, and had had several conversations with Durham, in which he admitted that he had cut the timber upon the 160 acres survey; that there was no settlement on the said tract, that he could see; “thinks that a little southwest of the mill was a corn crib, a lot, and small house, used for the hands who labored at the mill; the body of the land lay west of the mill; the principal part of the houses, or all but one, were east of the mill, on another tract;” that Durham’s family was residing in the county of Rusk at this time.

Another witness testified that he was county surveyor of Upshur county, and was deputy surveyor when the surveys were made; that he made the surveys for both Burleson and Durham; does not recollect which was surveyed first; refers to the records, supposing them to be correct; that Durham applied to him as surveyor, for a certificate, to the effect “that Durham was a *bona fide* settler upon said tract of land;” and witness refused the certificate, for the reason that he was not satisfied that he (Durham) was a *bona fide* settler upon the land.

Defendant read in evidence, patent to himself as pleaded, for the 160 acres; certified copy from the General Land Office of his settler’s claim, of his affidavit, and of two supporting witnesses that he was a *bona fide* settler on said land on May 16, 1870, and had occupied the same up to Novem-

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ber 9, 1870, certified to July 19, 1871, by the district clerk, and of field-notes of survey made 9th November, 1870, duly recorded and returned to the land office.

Defendant Durham testified that he took possession of the land about May 16, 1870, and was occupying it on August 12, 1870, and had continuously occupied it ever since; that on 9th November, thereafter, he caused the same to be surveyed, in good faith, with view to purchase the same under the 3d section of said act of 12th August, 1870; that on June 20, 1873, he caused to be paid to the Commissioner of the General Land Office one dollar per acre for said land, upon which his patent issued; that there were 600 cords of wood cut on the tract, worth three dollars per cord, half of it pine, and damaged one half its value; that about one hundred cords were left in the woods and burned,—hence the injunction; that he was hauling wood when enjoined.

“I was asked by Gillespie, if I knew whose land I was upon. I replied, that I supposed it was public land; and if so, it was mine. He then told me the land was Burleson’s. I then told him if it turned out to be Burleson’s, I would settle the damages.”

Witness had on the land a lot, a corn crib, a garden, and a cabin for the use of his hands at the mill. He put some of the improvements on the land in July, 1870. He built a stable on the land in 1871; that he used and occupied the land for mill and other purposes during the year 1870, from May, 1870, to October, 1872, and that during said time that was his place of business; that he never lived upon said land with his family.

The court refused to instruct the jury, as requested by plaintiff, viz:

“That a settler in good faith, in contemplation of law, is where a party goes upon a tract of land with his family, erects a dwelling-house on said land, and occupies said dwelling with an intention of remaining upon the same and making it his home in the future.

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“If you believe, from the testimony, that the defendant owned other lands in the State, and resided thereon with his family as a homestead, you must find for the plaintiff.”

Verdict for defendant, and for \$838 damages, upon which judgment was rendered. A motion for new trial was overruled. Burleson prosecutes his writ of error.

F. B. Sexton & P. F. Edwards, for plaintiff in error, cited *Trevino v. Fernandez*, 13 Tex., 630; *Cravens v. Brooke*, 17 Tex., 273; *Jennings v. DeCordova*, 20 Tex., 513; *Allen v. Harper*, 19 Tex., 502; *Bledsoe v. Cains*, 10 Tex., 459; *Fowler v. Allred*, 24 Tex., 185; *Parish v. Weatherford*, 19 Tex., 211; *Spier v. Laman*, 27 Tex., 215; *Teel v. Huffman*, 21 Tex., 781; *Kohlhass v. Linney*, 26 Tex., 333; *Green v. Biddle*, 8 Wheat., 76; *Saunders v. Wilson*, 19 Tex., 194.

McKay & McCord, for defendant in error, cited article 10, section 6, Constitution of 1869; *Styles v. Gray*, 10 Tex., 503; *Hoofnagle v. Anderson*, 7 Wheat., 212.

GOULD, ASSOCIATE JUSTICE.—If Durham, at the time Burleson located the land in controversy, was not so occupying it as to give him, under the statute, the right to purchase it of the State, the mere fact that a patent was afterwards improperly issued cannot affect any rights which Burleson acquired by his location. His file and survey, if made on vacant public domain, subject thereto, gave to Burleson an equitable title, secured by all the constitutional guaranties for the protection of private property. (*Wright v. Hawkins*, 28 Tex., 471; *Sherwood v. Fleming*, 25 Tex. Supp., 408.) The case of *Styles v. Gray*, 10 Tex., 503, cited by counsel for defendant in error, in support of the proposition that Burleson could not contest the validity of Durham's patent, appears to have been one in which the party who sought to attack the patent did not show that he had rights which were vested prior to its issuance.

The main question in the case below was as to the nature

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of Durham's occupancy, whether it was in fact such as entitled him to purchase the land of the State. His claim was under the 3d and 4th sections of an act to "regulate the disposal of the public lands of the State of Texas," as amended May 16, 1871. (Paschal's Dig., art. 7040, *et seq.*)

Section 1 of that act gives to every head of a family, who has not a homestead, one hundred and sixty acres of land as a homestead, out of any part of the public domain, upon condition that he or she will select, locate, and occupy the same for three years, and pay the office fees on the same. Single men were allowed eighty acres, upon the same terms and conditions. By section 2, the mode of procuring title by a person who shall occupy any portion of the public domain as a homestead is pointed out. The third and fourth sections are as follows:

"Any person who shall hereafter, in good faith, actually settle upon any part of the public domain, * * and shall occupy any part of such public domain, not exceeding one hundred and sixty acres, and furnish to the Commissioner of the General Land Office satisfactory evidence that he or she has, in good faith, so settled, shall be entitled to purchase the same from the State at the sum of one dollar per acre; and the certificate of the surveyor of the county or district in which the land is situate, that such person is an actual settler on said land, shall be deemed satisfactory evidence thereof. (Paschal's Dig., art. 7047.)

"Any person now occupying any part of the public domain of the State, in good faith, shall have the right to take the necessary steps, at any time within twelve months from the passage of this act, to appropriate the same, or a part thereof, to a homestead, under the first section of this act, or to purchase the same, or a part thereof, under the third section of this act; and no person shall have the right to interfere with said actual settler, by file, location, or survey, by virtue of any land certificate or other land claim whatever, within said prescribed time."

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Section 6, article X, of the Constitution then in force is as follows: "The Legislature shall not hereafter grant lands to any person or persons, nor shall any certificate for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

The statute was evidently framed with reference to this constitutional provision, and was designed to give the privilege of purchasing only to actual settlers. The third section gives this right to "any person who shall hereafter, in good faith, actually settle upon any part of the public domain." It is true, that, in the outset of the fourth section, the person whose rights are protected from interference by file or location is described as "any person now occupying any part of the public domain of the State in good faith;" but, in the latter part of the same section, he is further described as "said actual settler." Durham's rights, under this statute, depended on whether he was or was not an actual settler.

The word "settler," and the expressions "actual settler" and "settled in good faith," are of frequent recurrence in the legislation of Texas. The Constitution of the Republic contained the following provision: "In all cases, the actual settler and occupant of the soil shall be entitled, on locating his land, to inclose his improvements, in preference to all other claims not acquired previous to his settlement." (Gen. Provis., sec. 10.) The land law of 1837, in case of conflicting location, gives the preference "to the oldest occupant and settler." (Paschal's Dig., art. 4526.) The rights of "actual settlers," in those parts of the State where there were colony contracts, were protected by ordinance annexed to the first State Constitution, and by subsequent legislation. (Paschal's Dig., p. 76; and art. 828.) The various pre-emption laws extended privileges to individuals who settled upon and improved a portion of the public domain. (Paschal's Dig., art. 4326, *et seq.*)

The general policy of the Republic and the State has been to encourage immigration, and the settlement of the public

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domain, by giving a preference to the actual settler seeking to making of it a home. But it is not believed that it has been the policy to encourage, by special privileges, the mere temporary occupation or use of the public land. The word settle, as applied to lands, conveys the idea of permanent inhabitation. (Webster's Dict.) Certainly, the settler protected by the pre-emption laws was one who actually resided on the land settled. In all of the enactments, from 1853 down to 1871, the pre-emptionist is required to show that he resided upon and cultivated the land for three years. (Paschal's Dig., arts. 4336, 4343, 4358, 7052, 7053.) In the act of November 12, 1866, it is expressed thus: "That he or she is *bona fide* settled upon vacant land, and that he or she has resided upon and cultivated the same for the period of three years next preceding the time of making such proof." (Paschal's Dig., art. 7060.)

The statute which we are considering describes the persons upon whom it confers the privilege of purchasing, in terms similar to those used in the pre-emption laws. It seems to be kindred to those laws in its nature and objects, and we think it intends to give the right of purchasing to him only who occupies the public land as a residence, or with a view to residence. No one else can be said to have actually settled and occupied in good faith. He who has no homestead may, by three years of such occupancy and improvement, secure a donation of 160 acres, or he may, at his option, secure a title by purchase, without waiting for three years. He who has a homestead, but sees fit to remove to public land, may, by purchase, perfect his title before selling his original homestead. Certainly, a settlement may be commenced before the removal of the family to the land and before actual residence thereon. But the actual settler intended by the statute must reside on the land, or occupy preparatory to and with the *bona fide* intention of residing thereon. Occupancy for such a purpose may be occupancy in good faith.

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Occupancy for other purposes does not entitle the party to purchase as an actual settler.

The court below refused to give instructions, which were asked, embodying this construction of the statute, and refused a new trial, when the testimony of Durham himself failed to show residence, actual or contemplated. From the evidence, it appears that Durham had a mill on an adjacent tract of land, one corner of the mill extending on the land in question. He had also, according to his own testimony, on the land, a lot, a corn-crib, a garden, and a cabin, and, afterwards, a stable. He cut much of the timber on the land, and used it for mill purposes, from May, 1870, to October, 1872, and during that time this was his place of business. He does not state that it was, or was ever designed to be, his residence; and there is evidence that his residence was elsewhere. Under the evidence, the court should have given the instructions asked on the subject of residence, and should have granted a new trial. The judgment is accordingly reversed and the cause remanded.

REVERSED AND REMANDED.

Chief Justice ROBERTS did not sit in this case.

LIPSCOMB NORVELL v. JAMES PHILLIPS ET AL.

1. PAROL EVIDENCE OF CONFLICT OF GRANTS.—Upon an issue of inadequacy of price for which land was sold, it is admissible to prove, by parol evidence, that the land conflicted, or was supposed to be in conflict, with an elder grant, and also to show the supposed merits of the conflicting titles, as affecting the value of the land in general esteem, or with those who might wish to purchase.
2. SAME.—Though the existence and extent of the conflict of two grants can only be definitely determined, in many instances, by a survey, there is no reason why it may not be proved by any one who can testify to the fact.

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3. **OBJECTIONS TO TESTIMONY.**—When, by the bill of exceptions, it is not shown that the testimony was, under no circumstances, admissible, the court will suppose that the court below would have made the proper ruling, had the objection been insisted on to the testimony, so far as it seems objectionable.
4. **CHARGES OF COURT—ASSIGNMENT OF ERROR.**—When no specific error is assigned to the charge of the court, and there is no error of a controlling nature manifest, this court will not critically examine the charge to ascertain if it is in every respect accurate.
5. **SAME.**—A charge not applicable to the facts in evidence is properly refused, however correct as a principle it may be.
6. **ASSIGNMENT OF ERRORS.**—When there is a conflict of testimony, the general assignment, that the verdict is against the law and the evidence, is too general, and will not be considered.
7. **INTERVENTION.**—It can be no ground of complaint that necessary parties to a suit are allowed to make themselves parties, as intervenors, at their own instance.
8. **IRREGULARITIES.**—When a judgment is not warranted by the pleadings, but is of such a nature that it cannot affect the party complaining, it will be considered a mere irregularity, and no cause for reversal.
9. **PRACTICE.**—The fact that the relief granted has not been exhaustive, but further action was not asked by either party, is not ground of reversal.

APPEAL from Sabine. Tried below before the Hon. George Lane.

On the 25th day of May, 1869, the plaintiff in this suit, James Horton, contracted with the defendant, Lipscomb Norvell, for the purchase of one thousand acres of land, a part of the headright league of the said Lipscomb Norvell, which was located in the county of Limestone, near Tehuacana Springs. By the terms of the contract, plaintiff was to pay Norvell the sum of one thousand dollars in gold or silver by or before the 1st day of January, 1870, with ten per cent. per annum interest from the day of payment, and executed his note therefor, dated the 25th day of May, 1869, and payable the 1st day of January, 1870. When the said sum of money should be paid, the defendant Norvell was to execute and deliver a conveyance for the land pur-

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chased, to the plaintiff, with a general warranty of title to the same, and he executed and delivered to plaintiff, a title bond, bearing date the 25th day of May, 1869, in which the said contract was set forth.

On the 4th day of February, 1870, James Phillips, one of the intervenors in this cause, for himself and the other intervenor, James Atkisson, contracted with the defendant Norvell for the purchase of one thousand acres of land of the defendant's headright, situated in the said county of Limestone, being the same one thousand acres of land which the defendant, on the 25th day of May, 1869, contracted to convey to the plaintiff, James Horton. At the time of the contract for the purchase of the one thousand acres of land by the intervenors, James Phillips executed and delivered to the defendants a draft on George F. Alford & Veal, of Galveston, for one thousand dollars in gold, for the purchase-money of the one thousand acres of land, signing the name of James Atkisson only to the draft, and representing that he had authority to do so. On the same day, James Phillips, for himself and James Atkisson, entered into a contract with the defendant, Lipscomb Norvell, to purchase from him all that portion of his headright league of land situated in Limestone county in conflict with any eleven-league claim, the amount and extent of such conflict to be determined by actual survey as soon as practicable, and executed and delivered to the defendant the written obligation of himself and the said James Atkisson to pay to the defendant the sum of one dollar in gold per acre for all the land in such conflict.

At the time of the execution and delivery of the draft and written obligation before mentioned, the defendant, Lipscomb Norvell, agreed with James Phillips to have written at Jasper a deed from him to the said James Phillips and James Atkisson for the one thousand acres of land, with a general warranty of title thereto, and a quit-claim deed to so much of his said headright league as might be in conflict

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with any eleven-league claim, and forward the same to the Phillips, at Palestine.

On the 11th day of February, 1870, a deed of conveyance from the defendant to the intervenors, James Phillips and James Atkisson, with general warranty of title to the one thousand acres of land, and a quit-claim for so much of the defendant's headright league of land as might be in conflict with any eleven league claim, included in one instrument, was written at Jasper and signed and acknowledged by the defendant. But the payment of the draft before referred to, having been countermanded by the intervenor James Atkisson, and the payment of it actually refused, the deed was held by the defendant until the 8th day of August, 1870, when the intervenor, James Phillips, visited the defendant at his home in Sabine county, and after satisfying the defendant that he intended to act fairly in the matter, paid him one thousand dollars in gold as the purchase-money for the one thousand acres of land, and prevailed on the defendant to deliver him the deed.

On the 5th day of August, 1870, the plaintiff, James Horton, commenced a suit against the defendant, Lipscomb Norvell, to enforce a specific performance of the contract made by the defendant with him on the 25th day of May, 1869, to convey to him the one thousand acres of land before referred to.

The defendant answered the plaintiff's petition by a general denial, and pleaded specially that at the time of the execution of the said title bond to plaintiff by defendant it was understood and agreed, by and between him and the plaintiff, that time was of the essence of the contract, and that if the purchase-money for the land was not punctually paid on the 1st day of January, 1870, the time stipulated in the bond, the contract for the sale of the land should thereby become null and void; and that plaintiff failed to pay any part of the purchase-money by or before the 1st day of January, 1870.

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On the 5th day of August, 1872, the defendant amended his answer to the plaintiff's petition, and alleged that on the 1st day of December, 1869, the plaintiff applied to him for an extension of time within which to make payment of his note given to the defendant for the purchase-money of the one thousand acres of land; that defendant consented and agreed that plaintiff should have until the 15th day of January, 1870, within which to make payment of the note, and not beyond that time; and notified the plaintiff that he must make payment by that time, and that if he failed to do so, the contract should be at an end, and he would sell again, if he had an opportunity; to all of which the plaintiff then and there agreed.

The defendant also alleged that at the time he contracted with plaintiff to convey to him the one thousand acres of land, it was of the value of five dollars in gold per acre, which fact was well known to the plaintiff, but of which defendant was entirely ignorant, and that the plaintiff induced him to agree to sell to plaintiff the land at the grossly inadequate price of one dollar per acre, by fraud, and by falsely and fraudulently representing to defendant that the land was of the value of but one dollar in gold per acre, and by fraudulently suppressing the true value thereof.

On the 11th day of August, 1871, James Atkisson and James Phillips filed their plea of intervention, and alleged that on the 11th day of February, 1870, they purchased of the defendant the one thousand acres of land in controversy between the plaintiff and the defendant, and that on the same day defendant executed and delivered to them a conveyance for the said land, with general warranty of title, and that they then and there paid the defendant one thousand dollars in gold as the purchase-money of said one thousand acres of land. That on the 4th day of February, 1870, they entered into a contract with the defendant to purchase from him all that portion of his headright league of land which might be in conflict, with any eleven-league claim, the amount and extent

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of the conflict to be determined by actual survey as soon as practicable, and executed and delivered to defendant their written obligation to pay to him the sum of one dollar in gold per acre for all the land which might be included in said conflict, as soon as the extent of said conflict could be determined by survey, and the amount of money to be paid could thereby be ascertained; and that on the 11th day of February, 1870, the defendant executed and delivered to them his quit-claim deed for all of the land included in such conflict, and the quit-claim deed being a part of the deed to the one thousand acres of land. They averred their willingness to comply with their contract to pay the defendant the sum of one dollar in gold per acre for all the land included in the conflict before referred to; that the same had not been paid, from the fact that the survey stipulated to be made in the deed had not been made, and that the survey had not been made solely on account of the defendant's disposition to delay the same; and they offered to pay the amount of money due from them for the land so soon as the survey could be made and the proper amount ascertained.

They also alleged that they purchased the one thousand acres of land of the defendant long after the plaintiff Horton had forfeited and abandoned his contract with the defendant, and long after the contract in regard to the sale of said land between the plaintiff and defendant had been abandoned and treated as abandoned by the plaintiff and defendant, and that they purchased the land of the defendant in good faith and without any notice of any claim on the part of the plaintiff to any part of it.

They prayed for a decree dismissing the petition of the plaintiff as to all claim in regard to any of the land, and declaring the title to the one thousand acres of land to be in them, as evidenced by the deed of the defendant, and enforcing the contract for the purchase by them of the defendant of all that portion of his headright league of land which

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might be in conflict with any eleven-league claim, and for general relief.

The defendant filed his answer to the plea of intervention filed by James Atkisson and James Phillips, in which he denied all the allegations in the plea of intervention, and alleged that the sales of the lands in the plea of intervention set forth were by the intervenors induced and procured to be made to them by defendant by fraud, and that the deeds of conveyance of the lands mentioned in the plea of intervention were by the intervenors obtained and procured to be executed and delivered to them by defendant by fraud; that the sales and conveyances did not take place at the times indicated by the dates of the instruments as set forth in the plea of intervention, but that the sales were made and the conveyances executed and delivered on the 8th day of August, 1870. He offered to refund to the intervenors one thousand dollars in gold, paid him by the intervenor James Phillips on the 8th day of August, 1870, with legal interest thereon from that date; to surrender for cancellation the written obligation of the intervenors, dated the 4th day of February, 1870, in which they bound themselves to pay him one dollar in gold per acre for all of his headright in conflict with an eleven-league grant; and prayed that the sales to the intervenors might be annulled and set aside, and that the deeds might be canceled and adjudged to be void, and for costs, and for general relief.

The intervenors, by an amendment of their plea of intervention, replied to the defendant's answer to their plea of intervention, by denying all the allegation in the answer, and prayed to be permitted to rebut by proof the allegations of fraud in the answer; that their deed to the one thousand acres of land sued for by plaintiff be recognized as a valid title thereto; for the relief prayed for in their original plea of intervention, and for general relief.

On the 5th day of August, 1872, the defendant amended his answer to the plea of intervention, and alleged fraud on

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the part of the intervenors, as in his original answer to their plea, setting forth additional facts and circumstances constituting the same, and prayed as in his original answer, and that he might be permitted to withhold so much of the one thousand dollars paid him by the intervenors on the 8th day of August, 1870, as would be sufficient to reimburse him the costs by him expended in his defense against the plea of intervention, and for general relief.

On the 8th day of December, 1874, the defendant again amended his answer to the plea of intervention, and alleged that by means of the fraud and the false and fraudulent representations, suppressions of the truth, overreaching artifices, devices, importunities, and undue influence practiced by the intervenors, whereby they procured the sales and conveyances of and from defendant mentioned in the plea of intervention, as set forth in the defendant's previous answer and amended answer to the plea of intervention, he had been damaged in the sum of fifteen hundred dollars; and that by reason of said fraud practiced on him he had been put to great trouble and expense in defending the plea of intervention, and in the proceedings in this cause to rescind and set aside the sales and deeds, and in employing attorneys and obtaining the necessary evidence to resist the plea of intervention and effect the rescission of the sales and deeds, whereby he was damaged fifteen hundred dollars. He prayed judgment against the intervenors for his damages, and for general relief.

The case came to trial at the April Term, 1875. The jury found a verdict for the defendant as against the plaintiff, and for the intervenors as against the defendant and plaintiff.

The court rendered judgment in favor of the defendant against the plaintiff, and in favor of the intervenors against the defendant and the plaintiff, and awarding a writ of possession in favor of intervenors.

With the result of the trial, the plaintiff seems to have

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been satisfied. He made no motion for a new trial, and did not give notice of appeal. The defendant made a motion for a new trial of the issues joined between him and the intervenors, on various grounds, which motion was overruled and the defendant appealed.

On the trial, the intervenors exhibited their deed and contract with Norvell as pleaded, offering to pay for that part of the Norvell league in conflict with other grants, in accordance with their obligation.

The testimony by defendant, on the issues between intervenors and himself, was voluminous. Many letters passed between Phillips and defendant. The testimony showed that Phillips had managed well in obtaining Norvell's conveyance; that the land had increased in value greatly from 1869 to August, 1870, the time the deed was delivered—from twenty-five to fifty per cent. The causes of the increase in value were the establishment of Trinity University, by the Cumberland Presbyterian Church, in the neighborhood of the land; the successful organization of the University; the extension of the H. and T. C. R. R. through the land, &c. These facts were known to Norvell, but their effect on values was not, and in conversations with him, Phillips questioned their effect. Witnesses for Norvell fixed the value of the land in 1870 at from five to ten dollars, gold, per acre. Witness Henry testified that, in tracts of one thousand acres, one dollar per acre was a fair price for the Norvell league, and that it was understood in the neighborhood that the entire tract could be bought at that price.

It was shown by parol evidence that the greater part of the Norvell grant was in conflict with an older eleven-league grant, which was considered valid.

The errors assigned were—

1, 2, and 3. The admission of parol testimony of the existence of the eleven-league grant, its conflict with the Norvell grant, and the general opinion as to the relative merits of the two titles.

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4. Admitting the depositions of J. R. Henry; (that in 1869 the Norvell league, in tracts of one thousand acres, was worth about one dollar per acre, and that it was understood in the neighborhood that, by taking the whole survey, it could be had at one dollar per acre, which he considered a fair price.)

5 and 6. The charge given by the court upon the issues between intervenors and defendant.

7. Refusing the instructions asked by defendant.

8. Overruling the motion for new trial—the verdict being against the law and evidence.

Additional assignment—

1. The judgment in favor of intervenors for the recovery of the 1,000-acres tract claimed by them, and awarding a writ of possession therefor.

2. Giving judgment for intervenors for that part of the Norvell league which might be in conflict with any eleven-league grant, and awarding a writ of possession.

D. W. Doom & L. Norvell, for the appellant.—The law requires the highest proof of which the nature of the thing is capable, and oral evidence cannot be substituted for any writing, the existence of which is disputed, and which is material to the issue between the parties, and is not merely the memorandum of some other fact. (1 Phillips's Ev., 417; 1 Greenl. Ev., sec. 88.) The evidence offered by the intervenors, and admitted over the objection of the defendant, showed that there was better evidence, viz: the eleven-league grant itself.

The eleven-league claim, whether dated before or subsequent to the defendant's grant, was *prima facie* invalid, and the very best evidence of its existence and validity which was in the power of the party to produce ought to have been required.

This ruling of the court below was undoubtedly erroneous. The evidence offered by the intervenors did not tend to prove any issue between the parties; did not relate to the one

thousand acres of land in controversy, and was well calculated to mislead the jury.

The controversy between the intervenors and the defendant was not concerning the headright league of land of defendant, but was confined to one thousand acres of land, a part of the defendant's headright.

The transaction shows that it was not thought by the parties that the one thousand acres of land was in conflict with any other claim, and the evidence offered by the intervenors did not tend to prove any reputed conflict between the land in controversy and an eleven-league claim, and was therefore not admissible as affecting the value of the land in controversy, or for any other purpose.

The title of defendant to his headright was evidenced by a written instrument. And although the court erroneously permitted the existence and contents of an eleven-league claim, reputed to be in conflict with the defendant's headright, to be proved by parol evidence, yet the eleven-league claim, if it existed at all, must also have been a written grant. The comparative merits of the two grants was a question involving the legal interpretation and effect of each of them. It was therefore error to allow evidence affecting the comparative merits of the two grants to go to the jury.

The fourth assignment of error is that the court erred in overruling the objections of defendant to the testimony of J. R. Henry.

The value of the land in controversy, in 1869, might be one dollar per acre, and the same land, on the 4th day of February, 1870, or the 8th day of August, 1870, might be worth ten dollars per acre; and the one thousand acres of land in controversy might at any given time be worth ten dollars per acre, while the remainder of the league of land might be worth no more than one dollar per acre. Evidence, therefore, of the value of the land in controversy, in the year 1869, or of the value of the remainder of the league of land

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at the time, was not admissible. The effect of such evidence, when admitted, could only be to mislead the jury as to the real issue between the parties—the value of the land in controversy on the 4th day of February, or the 8th day of August, 1870.

The court, after instructing the jury that if they found from the evidence that the defendant executed and delivered the deed to intervenors, mentioned in their petition of intervention, for the consideration therein mentioned, to find for the intervenors against the defendant, unless they found from the evidence that the intervenors obtained said deed for said consideration by falsely representing to the defendant that there was an eleven-league grant that interfered with and took up a large portion of the land in Norvell's league, and that said consideration was grossly inadequate, when in fact there was no such eleven-league grant interfering with said Norvell's league, or that said intervenors, or either of them, misrepresented to said Norvell the value of said land, and misrepresented the circumstances in the vicinity of said land, of a nature calculated to raise the value of said land, and which did raise the value of said land, so as to induce said Norvell to sell said land at less than its value, and that said land was of much greater value than the price the same was obtained for by intervenors, then to find for the defendant against the intervenors,—proceeded to instruct them as follows:

“ Unless you find that said representation as to said eleven-league grant was that it was generally said in the vicinity of said Norvell league that said eleven-league grant did interfere with said Norvell grant.”

It is clear that the error in the charge complained of, taken in connection with the error complained of by the first assignment of error, did mislead the jury.

When it is evident that the verdict of the jury has been made to turn on an erroneous charge, and the judgment upon the merits is thus founded on error, or when there is

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material error apparent which there is reason to believe influenced the verdict of the jury to the prejudice of a party, the judgment will be reversed. (*Hollingsworth v. Holshousen*, 17 Tex., 47, 48; *Earle v. Thomas*, 14 Tex., 583; *Lee v. Hamilton*, 12 Tex., 419.)

It is error to charge the jury upon a supposed state of facts, as to which there is no allegation in the pleadings or evidence before the jury; and where it is not clear that the jury had not been misled by such error, the judgment must be reversed. (*Andrews v. Smithwick*, 20 Tex., 118; *Earle v. Thomas*, 14 Tex., 583; *Lee v. Hamilton*, 12 Tex., 413; *Love v. Wyatt*, 19 Tex., 315; *Dodd v. Arnold*, 28 Tex., 101.)

And when the jury may have been misled by an erroneous charge, the judgment will be reversed, although there were other grounds upon which they might have based their verdict. (*Ponton v. Ballard*, 24 Tex., 621, 622.)

There was not only a failure to instruct the jury as to the legal conclusions that were deducible from the most material portions of the evidence before them, but by the charge it was excluded from their consideration. The error renders the whole of the charge of the court in relation to the question of fraud erroneous. (*Chamblee v. Tarbox*, 27 Tex., 146, 147.)

The court also erred in the following part of the charge: "And if you further find that the circumstances in the vicinity of said league of land, which increased the value of said land, were of a public character, such as the running of a public railroad, or the erection of a public school or university, then it was not fraudulent for said intervenors, or either of them, to represent that such railroad or school or university had less effect on the value of the land than what they had, or what others thought they had,—then you will find for the intervenors against the defendant, Norvell."

This was in effect telling the jury that it was not fraudulent for the intervenors, in order to induce the defendant to sell his land to them for an inadequate price, to misrepresent the

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effect which the running of the Houston and Texas Central Railroad or the erection of Trinity University near the defendant's land had on the value of it. The law is exactly to the contrary.

A man who, by misrepresentation or concealment, has misled another, cannot be heard to say that he might have known the truth by proper inquiry, but must, in order to be able to rely on the defense that he knew the representation to be untrue, be able to establish the fact upon incontestable evidence, and beyond the possibility of a doubt. (*Kerr on Fraud and Mistake*, 78, 79; *Boyce v. Grundy*, 3 Pet., 210.)

But the intervenors nowhere in their pleadings alleged that the circumstances which they were charged with misrepresenting were public and notorious, and evidence to show that they were, without such allegations, was not admissible; and although evidence which tended to show that such circumstances were public and notorious may have been admitted without objection, there were no pleadings to authorize its introduction, and it was error to submit to the jury an issue based upon such evidence. (*McKinney v. Fort*, 10 Tex., 221; *Hall v. Jackson*, 3 Tex., 309; *Keeble v. Black*, 4 Tex., 71.)

Aside from the considerations that the charge of the court referred to was not correct as an abstract proposition of law, and that there were no pleadings to authorize it, it was a charge upon a supposed state of facts as to which there was no evidence before the jury.

To charge upon a hypothesis which has no foundation in the evidence, is error, for which the judgment will be reversed, unless it appear that the jury were not misled thereby. (*Earle v. Thomas*, 14 Tex., 583; *McGreal v. Wilson*, 9 Tex., 428; *Yarborough v. Tate*, 14 Tex., 483; *Andrews v. Smithwick*, 20 Tex., 118; *Dodd v. Arnold*, 28 Tex., 101.)

Counsel also discussed the action of the court in refusing the charges asked, and the facts as to their sufficiency to sustain the verdict.

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Jones & Henry, for appellees.

MOORE, ASSOCIATE JUSTICE.—The first, second, and third errors in the first assignment of error, complain of the action of the court in overruling exceptions to parol evidence offered by appellees to show a conflict of an eleven-league grant with the headright league of land of appellant, and that there was a rumored or reported conflict of an eleven-league grant with said league, and the comparative estimate in which these titles were held as affecting the value of the land bought by appellees.

The gist of appellant's complaint is the inadequacy of the price at which he was induced by fraud of appellees to sell the land about which this controversy has arisen. This fraud is alleged to have been perpetrated, in part at least, by representations made in regard to the conflict of appellant's headright with an eleven-league grant. There is no pretense that appellees represented that they had seen or examined that grant, or had any personal knowledge regarding it; or that they claimed or represented themselves as possessed of more legal skill, greater ability, or better information for determining the relative merits of these titles than appellant. The statements of appellees in reference to the supposed conflict were of a general character, such as usually occur in the negotiation of a bargain when one party is seeking to enhance and the other to diminish the price at which the trade shall be made. That the conflict in fact exists, or is reputed to exist, in the vicinity of the land; and that the supposed merits of the two titles, as affecting the value of the land in general esteem, or with those who might desire to purchase it, is unquestionably relevant to and is admissible in evidence where the question is as to adequacy or inadequacy of the price at which it was sold. The testimony was also legitimate as tending to disprove the fraudulent character of the representations alleged to have been made by appellees in reference to this conflict; nor do we perceive

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any valid reason why the existence of such conflict could not be proved by parol testimony. It would not ordinarily appear from an inspection of the grants, but must be shown by proof of their position upon the ground. Though the existence and extent of such conflict can only be definitely determined in many cases by a survey, we know of no reason why it may not be proved by any one who can testify to the fact, and especially where, as here, it is not important to know the precise extent of such conflict, but merely the general fact of its existence, as affecting the value of the property alleged to have been fraudulently purchased at a grossly inadequate price.

The bill of exceptions does not state the grounds of objection to the admission of the testimony assigned as the fourth error. It cannot be seen from a mere inspection of the bill that the testimony was under no circumstances admissible. If in some aspects it was objectionable, or some part of it was inadmissible, had the proper exception been taken, and the attention of the court called to it, we must suppose the correct ruling would have been made. If the testimony objected to had been excluded, appellees would then have had an opportunity of proving any fact which they relied upon in this evidence to establish by other competent testimony.

The fifth and sixth assignments of error ask a reversal for errors in the charge. These errors, if there are any, are not pointed out by either of these assignments; and as there is certainly no error of a controlling character plainly obvious on an inspection of the charge, the court, as it has been often held, is not called upon to make a critical examination to ascertain whether it is in all respects, strictly accurate.

The refusal to give the charges asked by appellant is assigned as the seventh ground of error. Appellant sought by three of these charges to renew his objections in a different shape to the insufficiency and defective character, as he supposes, of the proof of a conflict between his headright

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league of land and the eleven-league grant. What has already been said suffices to show that there was no error in the refusal to give these charges. The court could not have given them without overruling its previous decision. The deed which gives rise to this litigation, and appellant's letter, which seems to have been the inception of the negotiation in reference to this part of the land, show, that appellant was informed of the conflict, and regarded it as depreciating the average price at which the land could be sold.

The fourth charge asked by appellant could not have been given, unless it had been shown, which it was not, that the time within which the land in conflict was to be surveyed and paid for, was of the essence of the contract.

The eighth assignment complains of the ruling of the court on the motion for a new trial, and that the verdict of the jury is against the law and evidence. As the motion for new trial presents no specific and distinct error not embraced in the assignments of error, and the evidence is conflicting, this objection to the judgment is evidently not well taken. It is also too general.

Neither of the grounds presented in the second assignment of errors are believed to show any sufficient reason for the reversal of the judgment. No objection was made by appellant to appellees intervening in the suit; and it is now too late for him to object, if he would. It may be, the judgment for appellees amounts to no more than a judgment against appellant on his cross-demand to cancel the deed executed to them. The contract, as regards the thousand acres of land, with which there is no conflict, had been fully consummated. Certainly, as to it, the petition of intervention shows no ground of action against appellant; nor do we see that it shows that appellant was in default, or had violated the contract for the land in conflict. But they were no doubt proper, if not necessary parties to Horton's action; and certainly no one can object, if they choose to do so, that they did for him, by their voluntary appearance, what he

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should have done. Appellant is not alleged to have ejected appellees from the land, or to have disturbed them in its possession. There is, therefore, nothing in the pleading warranting the judgment ordering the writ of possession; but this, at most, is a mere irregularity, which does appellant no injury and gives him no good ground to ask a reversal of the judgment.

The judgment, in respect to the land in conflict, is certainly indefinite, if not defective. The only matter which was not disposed of when appellant's demand for the cancellation of the contract was refused, was the ascertainment of the quantity of land in conflict with the eleven-league grant, and the payment for it by appellees as proffered in their petition. This, we think, should have been adjusted and disposed of before the case passed from the control of the court. But neither party called the attention of the court to it, nor invoked its action upon it. Nor is the failure of the court to take such action as would have enabled it to have made a proper disposition of this part of the controversy, assigned as error.

The judgment is affirmed.

AFFIRMED.

Chief Justice ROBERTS did not sit in this case.

JAMES R. MOREHEAD v. THE INTERNATIONAL R. R. Co.

1. **JUDGMENT—PRACTICE—NEW TRIAL.**—A motion which, in terms, asks an arrest of judgment, on the ground that there is nothing in the verdict which shows that it was rendered against any party to the suit, is, in legal effect, a motion to set aside the verdict; and the action of the court below, on such a motion, which pronounces the judgment "arrested," leaves the case standing in court as if it had never been tried; such action of the court is not a final judgment from which an appeal can be taken.
2. **DISTINGUISHED.**—This case distinguished from *Denison v. League*, 16 Tex., 405.

Argument for the appellant.

APPEAL from Gregg. Tried below before the Hon. Z. Norton.

The action of the court below on the motion affecting the verdict, which is set forth in the opinion, is contained in the following entry, viz:

“The motion in arrest of judgment then coming on to be heard, was argued, and it is considered and adjudged that said motion be sustained. It is therefore adjudged that the judgment rendered in this cause against the International Railroad Company be, and it is hereby, arrested, to which plaintiff excepts,” &c. See opinion, for the language of the verdict.

A. T. Burke and *E. T. Ragland*, for appellant.—It is easy to perceive how the mistake, unintentional on the part of the jury, and a clerical error, if error at all, was made, when, at this time, from practice and business transactions, commercially as well as otherwise, those initials are used, prove this. Can it be said that the jury intends to find outside of the issues made by the proceedings? Is it not sufficiently certain to be rendered certain? The form of a verdict is not material. (*Burton v. Bondies*, 2 Tex., 203; *Wells v. Barnett*, 7 Tex., 584; *Cook v. Garza*, 9 Tex., 359; *Baker v. Wofford*, 9 Tex., 516; *Hamilton v. Rice*, 15 Tex., 382; *Frederick v. Hamilton*, 38 Tex., 336; *Burton v. Anderson*, 1 Tex., 93; *McMullen v. Kelso*, 4 Tex., 235; *Randen v. Barton*, 4 Tex., 289; *James v. Wilson*, 7 Tex., 230; *Horton v. Reynolds*, 8 Tex., 284; *Smith v. Johnson*, 8 Tex., 418; *Parker v. Leman*, 10 Tex., 116; *Avery v. Avery*, 12 Tex., 54; *Galbreath v. Atkinson*, 15 Tex., 21; *Moke v. Fellman*, 17 Tex., 367.)

But should the court hold that the verdict is insufficient, and did not find the points in issue, as contended for, ought not the court to have granted a new trial? The court overruled defendant's motion on that ground. (*Reynolds v. Johnston*, 13 Tex., 214; *Kesler v. Zimmerschitte*, 1 Tex., 50; *Ford v. Taggart*, 4 Tex., 492; *Hall v. York*, 16 Tex., 18.)

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If a verdict is neither certain in itself, nor finds facts upon which certainty can be allowed, it will be set aside. (*Mays v. Lewis*, 4 Tex., 38.)

Ought not the court, if the verdict was a nullity, to have set the same aside, and granted a new trial, as a matter of course, in the exercise of his judicial functions, instead of sustaining the verdict, but arresting the judgment and dismissing plaintiff's suit, in effect, on account of the error of the jury, if an error.

Reeves & Dodd, also for appellant, cited 1 Rob., (La.,) 519; 2 La., 359; *Smith v. Johnson*, 8 Tex., 421; 3 Vroom, (N. J.,) 334; 16 Tex., 405; 35 N. H., 364; 1 Saund., 228-41,

Baker & Botts, for appellees.

ROBERTS, CHIEF JUSTICE.—Appellant brought an action for a malicious prosecution, against the International Railroad Company, and two of its officers, H. M. Hoxie and J. C. Mow.

Upon a trial of the cause in the District Court, a verdict was returned into court, as follows, to wit: "We, the jury find for the plaintiff, J. R. Morehead, actual damages against the I. and G. N. R. R. Co., \$120. Exemplary damages (\$12,500) against the same company. Jesse G. B. Graybill, foreman."

A judgment was rendered in accordance with this verdict. A motion was made for a new trial, upon various grounds, which was overruled. A motion in arrest of judgment was also made upon the following grounds, to wit:

"1. Because there was no verdict of the jury against this defendant.

"2. Because the verdict is against the I. and G. N. R. R. Co., and there is nothing therein to show that it was intended to be against this defendant, but shows affirmatively that it is against some other corporation than this defendant, if against any one.

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"3. Because of the variance between the verdict and the judgment, which will not authorize said judgment. (Signed) Baker & Botts, for I. R. R. Co."

The action of the court upon this motion was recorded in an entry as follows, to wit:

"The motion in arrest of judgment then coming on to be heard, was argued, and it is considered and adjudged that said motion be sustained. It is therefore adjudged that the judgment rendered in this cause against the International Railroad Company be, and it is hereby, arrested, to which the plaintiff excepts, and here gives notice of appeal to the Supreme Court."

This was all the judgment that was entered. The plaintiff afterwards made a motion to have the jury reassembled to correct the verdict, which was overruled.

The judgment that was entered upon, and in pursuance to the verdict, was "arrested" on account of the alleged defect of the verdict, the effect of which was simply to set aside the entry of judgment that had been made, and a declaration of record by the court that no judgment would be rendered in favor of the plaintiff on that verdict. The petition of plaintiff was not decided to be defective, and there was no judgment against the plaintiff or for him; that he take nothing by his suit or for costs; nor was there any judgment for or against the defendants. The case was not dismissed, but stood in court just as if there had been no trial or verdict.

Properly speaking, the motion, which was sustained by the court, was not a motion in arrest of judgment. (Stephens on Pl., 96.) The grounds set forth in it are, most usually in our practice, embraced in a motion for a new trial. It was, in legal effect, a motion to set aside the verdict, because it was not responsive to the pleadings of the plaintiff, and for that reason no valid judgment could be rendered on it. Whether it was called by its proper name or not, the court, upon sustaining it for the reasons therein set forth, should

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have awarded a new trial, a *venire de novo*. (Stephens on Pleadings, 99.)

The effect of the action of the court on the motion was to leave the case standing in court for another trial, when called, just as if it had never been tried.

There being no final judgment in the case, an appeal cannot be entertained.

We are referred by counsel to the case of Denison v. League, as authority for entertaining the appeal in this case. In that case there was a motion in arrest of judgment sustained, "with leave to the plaintiff to amend, which he declined. The judgment was then entered as arrested; from which the defendant appealed."

From this it is plain that there was a proper entry of a final judgment, disposing of the case, upon the plaintiff having declined to amend a defective petition, and that judgment was affirmed because the petition did not state a good cause of action, as is shown by the opinion in the decision of the case in the Supreme Court. (16 Tex., 405.) We are therefore precluded from passing now upon the ruling of the court in setting aside the judgment that was entered on account of the alleged defect of the verdict, because there is no final judgment to appeal from in this case. (Moore v. Robbins, 18 Wall., 588; The Lucille, 19 Wall., 73.)

DISMISSED.

M. L. DURHAM, ADM'R, v. SOUTHERN L. I. Co.

1. JURISDICTION—REMOVAL OF CAUSE TO A UNITED STATES COURT.—The filing of an application, in due form, for the removal of a cause from a State court to a Circuit Court of the United States, which contains a good cause for removal, under the laws of the United States, when the same is filed by one authorized by law to make the application, and the filing of the bond required in such case, have the effect to suspend instantly the jurisdiction of the State court.

Argument for the appellant.

2. APPEAL — PRACTICE—FINAL JUDGMENT.—No appeal lies to the Supreme Court of the State from an order removing a cause to a Federal court, there being no final judgment, in contemplation of law, rendered. The right of the party to have the cause transferred, on his application, under the laws of the State and of the United States, could only be inquired into by the Supreme Court of the State, on a refusal of the application, and after final judgment.
3. JURISDICTION.—When a cause has been improperly transferred from a State court to a court of the United States, the United States court alone has jurisdiction to correct the error.

APPEAL from Gregg. Tried below before the Hon. Z. Norton.

McKay & Mabry and *Mc Cord*, for appellant.—Neither article 639, Revised Statutes of the United States, nor the subdivision 3 of same, refers or applies to corporations. Corporations are not embraced in the term, “citizen,” used in said section.

Corporations were held to be citizens, for the purpose of jurisdiction, under the original Federal judiciary, and the amendments thereto, until the act of July 27, 1868, when there was a new rule upon that subject made for all corporations. (Brightly’s Dig., 2 vol., title REMOVAL.) The term “citizen” was never defined by the Constitution or laws of Congress until April 9, 1866. (2 Brightly’s Dig., 118.) See same definition, retained and continued in Revised Statutes, art. 1992.

The naturalization laws of 1802, and others upon that subject, prescribe the mode in which foreigners might become citizens, but never defining who was, or what it took to constitute a citizen. The act of 1855 made children born abroad citizens, the parents being citizens.

The term “citizen,” under the congressional definition now, can apply only to natural persons.

Hence, since the act of 1866, whenever, in the laws of Congress, the term citizen is used, it can be construed to apply to none else than natural persons. Hence, also, the necessity of the legislation of Congress in 1868, above referred

Argument for the appellee.

to; and the same still maintained in the Revised Statutes, art. 640.

The appellee is a domestic corporation of the State of Texas, so far as the exercise of its franchise in this State is concerned, by virtue of its compliance with the act of our Legislature, approved May 2, 1874. See General Laws, 2d session, 14th Legislature, 197. See also certified transcript from comptroller's office, made an exhibit to appellant's motion to remove.

We further submit, that the petition to remove must show that the relation of the parties at the date of the institution of the suit was such, as would have given the Federal court jurisdiction; that one of the parties was a non-resident at the date of filing the motion.

Robertson & Herndon, for appellee.

1. That a corporation is a citizen of the State whose laws create it, for all purposes of jurisdiction in Federal courts, and for removal of case, we have but to refer the court to the case of *Railway Company v. Whitton*, 13 Wall., 270.

2. There is no final judgment from which to appeal. The order of removal is, by its terms, not final. If jurisdiction does not attach in the Circuit Court of the United States, it is then, in fact, as well as form, not final.

3. The defect in the petition for removal does not exist. It is judicially known that a corporation created by an act of a State Legislature is unchangeably a citizen of that State. Its domicile cannot be changed.

4. The fact that the appellee has qualified itself to contract and do work in Texas, does not forfeit its right to remove. This has been uniformly held. (See Bliss on L. Ins., p. 755, sec. 420, and notes.)

5. The new rule for corporations referred to in appellant's brief will be found to apply only to corporations created by an act of Congress.

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ROBERTS, CHIEF JUSTICE.—Appellant brought a suit against appellee, upon a policy of insurance, on the 25th of March, 1875, in which it was alleged that said company was chartered by an act of the Legislature of the State of Tennessee, and had its domicile and principal office in Memphis, in said State; that said company had a license to transact its business in this State, and that its agents in this State were Hammill, May & Co., whose local office and agency was established in Dallas, in this State. After service upon said agents, or a part of them, the defendant, by its attorneys, filed an answer of general denial, on the 13th of May, 1875. On the same day, the defendant filed a petition, sworn to by G. S. May, one of said firm of agents, to remove said cause into the "Circuit Court of the United States for the western district of Texas, held at Tyler, in which district said cause is now pending," in which it was stated, as grounds for said removal, "that the defendant is a corporation, chartered by the laws of the State of Tennessee, and is a citizen of said State;" that "said suit was brought by M. L. Durham, a citizen of the State of Texas, in the District Court of the State of Texas for the county of Gregg;" that the amount in dispute in said suit, exclusive of costs, exceeds the amount of five hundred dollars; that defendant "has reason to believe, and does believe, that, from prejudice and local influence, this defendant will not be able to obtain justice in the said State District Court of the county of Gregg." The defendant, also by said agent, with sureties, filed a bond to pay costs, if the removal should be held to be wrongful, and to enter said cause, with copies of the proceedings therein, in the said Circuit Court of the United States, on the first day of its session, at Tyler.

The plaintiff filed an answer to the motion for removal, upon the grounds that the petition was not sufficient; that there is no law authorizing the defendant to make such an application; that such an application can only be made by a natural person, and not by an artificial person, as a corporation is; that said defendant has become a corporation in this

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State, for the purposes of this suit, by voluntarily obtaining the certificate of qualification to do business in this State, from the comptroller, under the law of this State, and therefore is not a person competent to make such an application. "And plaintiff denies all of the allegations of the petition of defendant, and asks that they may be inquired into by proof, upon the hearing of the application for the removal of said cause." In support of these grounds of objection, plaintiff's counsel contend that the decisions of the Supreme Court of the United States, recognizing a corporation of a State as a citizen, for the purposes of such a removal, are not now applicable, (*Railway Company v. Whitton*, 13 Wall., 270,) because, by the act of Congress defining who is a citizen, a corporation is not embraced, (Rev. Stat., p. 351, act of 1866;) that the act of Congress of 1868, allowing a corporation to apply for such a removal, does not embrace, as a ground for it, prejudice and influence, as set up in this application, (Rev. Stat., p. 114, sec. 640,) and that defendant is, as to this suit, a corporation of this State, under the act of the Legislature of 2d May, 1874. (Genl. Laws, p. 197.)

The court, upon hearing the motion, ordered the removal of the cause as prayed for, and a suspension of the proceeding of said cause in the said District Court, to which the plaintiff excepted, and gave notice of appeal to the Supreme Court, and assigned as error the ruling of the court on said application for the removal of the cause.

In this court the defendant, by attorneys, filed a motion to dismiss the appeal, on the ground that this court is without jurisdiction, as the case had been removed from the court below to the Circuit Court of the United States for the western district of Texas, at Tyler, before the appeal was taken.

This motion is founded on the principle that the filing of the application in due form, containing a good ground for removal, under the laws of the Congress of the United States, by a person authorized by law to make the application, and

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the filing of the bond required in such case, have the effect to suspend instantly the jurisdiction of the State court.

Justice Nelson, in a case on the circuit, held, that "no affidavits can be read before the State court in opposition. The application on the petition is *ex parte*, and depends on the papers on which it is founded; and if they are regular, and conform to the requirements of the statute, the court has no discretion; the act is peremptory." (*Fisk v. The Union P. R. R. Co.*, 8 Blatchf., 247.)

Justice Blackford, in an elaborate review of the statutes and the decisions of the Supreme Court thereon, in a motion in the same case, at a previous term, says: "An order refusing a removal cannot prevent a removal, nor can an order granting a removal promote a removal. Neither order can affect the jurisdiction of this court in any manner whatever." Further, he says: "When the proper petition is presented in the State court, with the surety, so that the court acts upon the matter judicially, in any way whatever, whether the State court accepts the surety or not, unless it puts its refusal upon some valid defect in the petition, or some insufficiency in the surety, it loses jurisdiction of the cause *co instanti*."

In the same opinion, quoting from Justice Nelson, in the case of *Dennistoun v. Draper*, 5 Blatchf. Rep., 336, it is said that, "if the petition and affidavit, with the certificate of counsel, failed to bring the cause within the act of Congress providing for the removal, it would be the duty of the court to remand it." "The question of jurisdiction belongs to the Federal courts, and must be heard and determined there." (*Ib.*, 393.)

This will suffice to show the views generally entertained by the Federal courts of their powers on the subject. Had the State court overruled the application and proceeded to a trial and judgment in the cause, upon an appeal from the judgment rendered, the questions of the right of defendant to make this application, under the laws of this State and of the United States, and the competency of the grounds set out

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to effect the removal, might have been proper subjects of revision by this court. (*Kanouse v. Martin*, 15 How., 198.)

As the application for the removal was granted, because the District Court deemed the petition to be in due form by a proper party, and the surety sufficient, the plaintiff may apply to the Circuit Court of the United States for the correction of any errors that may have been committed to his prejudice, by proceedings in conformity with the rules and practice of said court.

An appeal to this court from said order of removal by the District Court, cannot avail him, because there is no final judgment in the District Court—not any more than an order changing the venue from one District Court of the State to another. In contemplation of the Constitution and laws of the United States, the said Circuit Court, in reference to such a suit as this, is a court for this State, though created by the Federal Government; and if the grounds upon which it is given the preference over the District Court, in the trial of this cause, are found not to exist, it must be presumed that it would be remanded, or the jurisdiction be otherwise declined.

We cannot decide in favor of the defendant's motion to dismiss this appeal, upon the ground set out in the motion, because that would require this court to determine whether or not the application for removal was sufficient, and whether or not the answer of plaintiff to the application was sufficient to prevent the removal, which would be to assume jurisdiction to hear and determine the questions involved in the application. This we cannot do, for a reason apparent upon the record, which is, that the case has not proceeded to final judgment. In the remedy by appeal, the powers of this court, for the revision of errors committed in the District Court, can only be brought into action after a final judgment has been rendered, disposing of the cause for or against the party who brings the suit.

For want of a final judgment, the appeal is dismissed.

DISMISSED.

HOWARD COOPER & Co. v. P. S. HARRIS ET AL.

PRACTICE—OFFICER—REPLEVY.—No recovery can be had, on motion, against an officer who levies an attachment, for failure to take a sufficient replevy bond.

APPEAL from Upshur. Tried below before the Hon. Z. Norton.

Reeves & Dodd, for appellants.—If it should be held that a failure to execute and return an attachment does not subject the officer and his sureties by motion, under Paschal's Dig., art. 3796, then we insist that, under article 990, Paschal's Dig., the motion was proper against the officer P. S. Harris.

The cause of action is well set forth, or, if not, is good on general demurrer; and, under our system of pleading, the court will not notice the name the pleader gives his cause of action. It is simply a suit on bond of P. S. Harris, and is good.

F. J. McCord, for appellee, on motion to dismiss.

ROBERTS, CHIEF JUSTICE.—Appellant brought suit, in the District Court of Upshur county, against E. M. Walker & Co., and recovered a judgment thereon for their debt, and for the sale of the property attached in said suit, the same being a lot in Longview, and certain goods, wares, and merchandise. The lot was accordingly sold, but the goods could not be found, as appears by the return of the sheriff, on the execution issued upon said judgment. The attachment was issued to, and levied on said lot and goods, by Pleasant S. Harris, a constable in and for the county of Upshur.

On the 11th of January, 1875, after the rendition of said judgment, and the return of said execution, the appellants, Howard, Cooper & Co., filed a motion in the District Court of Upshur county, against the said Harris, and others, his sureties, to recover the unpaid balance of said judgment, on

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the ground that said Harris, after having levied said attachment on said goods, by his negligence, failed to take a sufficient replevy bond from said E. M. Walker & Co., when the goods were by him returned to them, and that thereby the said Howard, Cooper & Co. had lost their said debt.

The said Harris and his sureties filed an answer to said motion, in which they excepted to it, upon various grounds, one of which was, that they were not liable to be proceeded against for such a default, by motion, as attempted in this case.

The court sustained this exception and dismissed the case. The party making the motion appealed from the judgment, and assigned this ruling of the court as error.

To justify a summary motion of this sort, on any ground, it must be instituted upon a statute specifically authorizing it. We have been referred to none such. We know of no statute authorizing a motion to be made against an officer who levies an attachment, for failing to take a sufficient replevy bond.

This being sufficient to dispose of the case, it is unnecessary to notice other points presented in the record.

This being a good ground for dismissing the motion, the judgment of the court below is affirmed.

AFFIRMED.

THOMAS F. PURNELL ET AL. v. B. F. GANDY & SON.

1. CHARGE OF COURT.—In a suit for damage against an officer for seizing property, claimed as belonging to the estate of a party against whom proceedings in bankruptcy were taken, and where there is evidence tending to show that the goods seized had been conveyed by the bankrupt in violation of the provisions of the bankrupt law, it is error to refuse instructions asked by the defendant, informing the jury of the terms and provisions of the bankrupt law, apparently violated by the bankrupt, as to the goods so seized.

Statement of the case.

2. **FRAUDULENT PREFERENCE BY BANKRUPT.**—In such a suit, it was error to refuse, when asked to instruct, the substance of section 35 of the bankrupt act.
3. **DEPOSITIONS—OBJECTIONS.**—Questions, and answers thereto, relating to matters of opinion or of law, may be objected to, when offered; such objections do not relate to the manner and form of taking and returning depositions.
4. **OPINION OF WITNESS.**—A question and answer eliciting merely the conclusion of the witness as to a matter of opinion or of law: *Held*, Not admissible, and that objections made thereto when the depositions were offered should have been sustained.

APPEAL from Upshur. Tried below before the Hon. Z. Norton.

June 30, 1873, B. H. Gandy & Son brought an action against Thomas F. Purnell, United States marshal for western district of Texas, Clifton Witherspoon, his deputy, Gregg & Ford, Briggs, Payne & Co., and W. D. Simmons, for damages for maliciously and wrongfully breaking open the storehouse of plaintiff, and taking therefrom goods of the value of \$4,896.80; both actual and punitive damages were claimed.

The defendant pleaded proceedings in bankruptcy in the United States District Court against one S. F. Spencer, in which proceedings, under an order for the seizure of the goods of the bankrupt, the goods were taken and turned over to the assignee of said Spencer when he was appointed.

The pleadings are given substantially in the opinion.

The defendant asked the court to instruct the jury as follows: "If any person being insolvent, or in contemplation of insolvency, within four months before the commencement of proceedings in bankruptcy against him, with a view to give a preference to any creditor or person having a claim against him, procures any part of his property to be attached, or makes any payment or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, or to be benefited by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, or

Argument for the appellees.

conveyance is made in fraud of the bankrupt act, the same is void under the law." Other instructions were asked defining insolvency, fraudulent preference, payment, &c., under the bankrupt law, all of which were refused. The only instruction given, touching the issue made, attacking the transfer from Spencer, under which plaintiffs were charged to be purchasers with notice, is given in the opinion.

The jury found the following verdict:

"We, the jury, find for the plaintiffs against all the defendants the sum of \$8,096.80 as actual damages, with costs of suit; and we further find \$1,103.19 as exemplary damages, making the aggregate sum of \$10,000 as actual and exemplary damages added together."

Upon this verdict judgment was rendered.

Robertson & Herndon, for appellants, discussed the facts with great ability; insisting that the charge of the court was erroneous, and that the charges refused should have been given, citing, *Toof v. Martin*, 13 Wall., 40; *Sawyer v. Turpin*, 5 Bankrupt Reg., 339; *Wadsworth v. Tyler*, 2 Bankrupt Reg., 316; *Graham v. Stark*, 3 Bankrupt Reg., 357; *Scammons v. Cole*, 3 Bankrupt Reg., 393; *Rison v. Knapp*, 4 Bankrupt Reg., 349; *In re Forsyth et al.*, 7 Bankrupt Reg., 174; *Wilson v. City Bank*, 5 Bankrupt Reg., 270; 17 Wall., 473; *Driggs v. Moore, Foote & Co.*, 3 Bankrupt Reg., 602; *North v. House*, 6 Bankrupt Reg., 369; *Walbrun v. Babbitt*, 16 Wall., 577.

A. T. Burke, for appellees.—It is contended by appellants that the sale of the goods to Gandy & Son was void under the bankrupt law. If appellees are innocent purchasers they are not affected. The jury, by their verdict, say they were. (*Jackson v. Henry*, 10 Johnson Rep., 195; *Fletcher v. Peck*, 6 Cranch's Rep., 87 to 148; *Bumpus v. Platner*, 1 John. Ch. Rep., 216.) As to vague rumors, *Jackson v. Given*, 8 Johnson Rep., 140.

Argument for the appellees.

When the equities are equal, that title which is prior in time shall prevail—*Qui prior est in tempore potior est in jure*. (4 Kent, 178-9; 1 Story's Eq., 381, 434.)

It is not sufficient, to show fraud on the part of the vendor to the injury of creditors, to set aside the sale. It must be proven and shown that the vendee had notice, or a knowledge of the fraud. (*R. & D. G. Mills v. Walker*, Dallam, 416.)

The title of a second vendee can only be impeached by showing that he participated in the fraudulent sale, or that his purchase was *mala fide*, that is, made with a knowledge that the sale of the first vendee was fraudulent. (Bump on Bankruptcy, 468; *Babbitt v. Walburn*, 4 Bankrupt Reg., 121.) The attention of the court is especially called to the case of *Anderson v. Roberts*, 18 Johnson's Rep., 515.

Fraud on the part of a vendor cannot affect the right of a *bona fide* purchaser, for a valuable consideration, who was not a party to the fraud. (*Pierson v. Tom*, 1 Tex., 577.)

It is for the jury to determine, from the facts and circumstances developed by the testimony in a cause, whether the intention of the parties was fair and *bona fide* at the time of the sale, or was fraudulent. (*Bryant v. Kelton*, 1 Tex., 415.)

Fraud cannot be presumed; it must be actually proven, or a conclusion from facts that will not admit of any other conclusion consistent with fair dealing. (*Tompkins & Co., v. Bennett*, Admr., 3 Tex., 36; *Paxton v. Boyce*, 1 Tex., 317.)

The credibility of conflicting witnesses is a matter peculiar to the jury, and the verdict will not be set aside or disturbed because they may have erred. (*Stewart v. Hamilton*, 19 Tex., 101; *Russell v. Mason*, 8 Tex., 228; *Mitchell v. Matson*, 7 Tex., 4; *Anderson v. Anderson*, 23 Tex., 641; *Latham v. Selkirk*, 11 Tex., 321; *Barnette v. Hicks*, 6 Tex., 353; *Baldridge v. Gordon*, 24 Tex., 288; *Davidson v. Edgar*, 5 Tex., 496; *Legg v. McNeill*, 2 Tex., 428; *Hall v. Hodge*, 2 Tex., 323; *Perry v. Robinson*, 2 Tex., 490.)

A verdict must be clearly wrong to induce this court to set it aside. (*Long v. Steiger*, 8 Tex., 462; *Gamage v. Trawick*,

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19 Tex., 64; *Briscoe v. Bronaugh*, 1 Tex., 340; *Perry v. Robinson*, 2 Tex., 491; *George v. Lemon*, 19 Tex., 152; *Cummins v. Rice*, Id., 226; *Oliver v. Chapman*, 15 Tex., 410; *Ables v. Donley*, 8 Tex., 336.) It is not enough that it is not clear that it is right, according to the case of *Briscoe v. Bronaugh*, 1 Tex., 340, or that there was conflicting evidence. (*Edrington v. Kiger*, 4 Tex., 93.)

If a verdict is right, and justice has been done, will this court interfere and set it aside and grant a new trial, because the court failed to charge the law fully, as complained of by appellants?

If, upon the whole, justice has been done, and the verdict be substantially right, a new trial ought not to be granted, though some mistakes have been made. (*McLanahan v. Universal Insurance Co.*, 1 Peters, 170; *Mirick v. Hemp-hill*, Hemp., 179.)

Although the omission to charge on an important question of law arising on the trial, is not, in itself, a reason for granting a new trial, the court will, in its discretion, award a new trial, if the justice of the case requires it to be done. (*Cal-breath v. Gracy*, 1 Wash., C. C., 198.)

A court will not grant a new trial unless the rules of law and the purposes of justice require it.

A new trial will not be granted for a misdirection of the judge, if justice can be done the parties by the exercise of other powers vested in the court. (*Stimpson v. The Railroads*, 1 Wall. Jr., 164.)

The jury having come to a proper verdict under an erroneous charge, and the evidence, though conflicting, being sufficient to reasonably satisfy the mind that their conclusion was correct, the verdict will not be disturbed. (*Merriwether v. Dixon*, 28 Tex., 18, 19; 7 Tex., 556; 8 Tex., 439; 16 Tex., 94.)

A new trial will not be granted against strong circumstances of equity. (*Denniston v. McKeen*, 2 McLean, 253.)

If a sheriff (and we apprehend the same principle applies to a United States marshal) seize the goods of B, under a

Argument for the appellants.

process against A, he is liable for such misapplication. (1 Chitty's Plead., 185; 3 Stark. Ev., 1120; *Buck v. Colbath*, 3 Wall., 335.)

We suppose it will not be denied that a sheriff or United States marshal executes writs of this character at his own risk, and may require an indemnity bond for his own security; but the taking of such a bond is no satisfaction to the party aggrieved, and does not justify the trespass in any sense, if there be a trespass committed. (*Paschal's Dig.*, art. 151.)

S. Robinson, in reply, for appellants.—It has now been settled by the most respectable authority, that under the provisional warrant, the marshal may seize property transferred, in fraud of the bankrupt act, to a third person, and in such person's possession. See *Bolander v. Gentry*, 36 Cal., 105; *Hanson v. Herrick*, 100 Mass., 323; *Foster v. Hackley & Sons*, 2 Bankrupt Reg., 409; *In re Hussman* 2 Bankrupt Reg., 437; also the 13th amended order in bankruptcy, to be found in the sixth, seventh, or eighth edition of *Bump on Bankruptcy*; *Stevenson v. McLanin*, vol. 3, No. 30, *Central Law Journal*.

The brief of the learned counsel for the appellee is devoted almost entirely to argument and authorities in proof of the sanctity of the verdict of the jury, more particularly in cases of fraud. We wish to state our view of this subject.

When a case is appealed to this court, and the appellant complains that, for error in the charge, the real issues involved in the case have not been submitted to or determined by a jury, this court will first ascertain what the issue made by the pleadings is; next, it will examine the evidence, not to determine the issue, but to ascertain if there is evidence tending to prove the side of the appellant upon the issue already seen; if there is such evidence, the court will then look to the charge of the court, to see if the true issue has been submitted to the jury; if it has, unless the verdict is

Argument for the appellants.

manifestly contrary to the evidence, the judgment will be affirmed; but if the real issue has not been submitted to the jury, and the appellant has, in the court below, requested such charges as should have been given, then the court will reverse. We do not mean to dictate the method this court should follow in the investigation of any case, but adopt this plan to make clear our views to the court. The verdict of a jury is always responsive, not to the pleadings, but to the charge of the court; the questions they decide are not those that involve the merits of the case, unless they are communicated to the jury through the charge of the court. If the charge of the court in this case submits to the jury the real question in the case, with proper instructions as to the law applicable to that question, then the verdict of the jury is entitled to the highest consideration. But if the charge does not do this, then their verdict is an answer to one question, and the question in this case is a totally different one. Let us state the real question in this case: "Were the transfers which passed the property from the bankrupt to the Gandys valid, as tested by the provisions of section 35 of the bankrupt act?" To submit this question to a jury, it is absolutely essential that the jury should know what the provisions of section 35 are. In this case no such question was submitted, or information given to the jury. We are at a loss to know how to state the question of fraud as submitted to the jury by the court in this case. Certainly, no single provision of section 35 was given to the jury as the means of testing the fairness of the transfers complained of. To say that the court gave the jury the tests provided by the State statute would at least be unfair to the statute. It would be impossible for a learned court to take the charge of the court in this case and decide that any transfer, tested by it alone, could be fraudulent. The court has submitted to the jury this question: "Were these transfers fraudulent?" But every instruction intended as an aid to the jury in determining this question is either erroneous, unintelligible, or wholly irrele-

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vant to the case. It is submitted that the issue in the case has never been passed upon by a jury.

GOULD, ASSOCIATE JUSTICE.—Appellees, B. F. Gandy & Son, brought this suit against Thomas F. Purnell, United States marshal, Clifton Witherspoon, his deputy, and sundry other parties, claiming damages for an alleged trespass, in forcibly entering their storehouse, by breaking the locks and hinges of the door, and seizing and converting to their own use a stock of groceries and goods, alleged to be the property of the plaintiffs, and of the value of \$4,896.81. They asked a judgment for damages, including the value of the goods seized, injuries to the door, disturbance in the possession of their storehouse, and the interruption and breaking up of their business as merchants; and in an amended petition they also claimed damages, on the ground that the trespass was committed maliciously, and with intent to injure the plaintiffs.

In the answer, it was alleged that the goods seized were in fact the property of one Samuel F. Spencer, against whom proceedings had been commenced by some of the defendants, to force him into involuntary bankruptcy, and that the goods were seized by virtue of a writ of seizure issued by the United States District Court for the western district of Texas, commanding the marshal to take possession of all the estate of said Samuel F. Spencer, both real and personal. It was alleged that the storehouse was entered lawfully, without damage thereto, and with the use of only such force as was necessary and lawful in the execution of the writ of seizure; and that the goods were held by the marshal for the benefit of the assignee in bankruptcy of said Samuel F. Spencer's estate, he having been, in November following the seizure, adjudicated a bankrupt. The answer charged that shortly before the seizure, and in the same month, Samuel F. Spencer, with intent to defraud his creditors, transferred the goods seized, being his entire stock, to his brother, L. M. Spencer,

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who, it is alleged, was a participant in the fraud, and who, in the same month, made, without consideration, a pretended transfer thereof to plaintiffs, who are also charged with notice and knowledge of all the facts alleged. It was further alleged that the transfer by Samuel F. to L. M. Spencer was made in payment of an alleged debt, in which the said L. M. Spencer, by the procurement of his brother, had sued out a writ of attachment, and caused the same to be levied on said goods; that said payment was made within four months before the commencement of proceedings to put his estate into bankruptcy; was made when he was insolvent and in contemplation of bankruptcy, and that L. M. Spencer received the same, knowing that Samuel F. was insolvent and in contemplation of bankruptcy; that said payment or conveyance was in fraud of the bankrupt law, and null and void, and that Gandy & Son bought with notice and knowledge of all the facts.

This is a sufficient statement of the pleadings to show that, under the pleadings of both parties, the property in the goods was a material issue. Without entering into the details of the evidence, it is sufficient to say that there was evidence tending to establish that the transfer between the Spencers was void under the provisions of the bankrupt act, as alleged in the answer, and tending to establish that Gandy & Son had notice of that fact.

Under this state of the pleadings and evidence, it was certainly the duty of the court, at all events where requested to do so, to have instructed the jury as to the effect of the bankrupt act on the transaction between the Spencers. A charge substantially in the terms of the 35th section of that act was asked, but was refused. The charge, as given, contains no direct reference to the bankrupt law, and gave the jury no information as to what facts would, under that law, make the payment or conveyance by Samuel F. to L. M. Spencer fraudulent and void. The jury are told that "any conveyance out of the usual and ordinary course of business is *prima facie*

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evidence of fraud; but such conveyance will admit of explanation. A preference given to creditors by a debtor, unless such preference perpetrated a wrong and injury on some person, is not fraud as contemplated by law, but such preference is to be closely scrutinized, in order to ascertain whether or not such transaction is free from fraud." As this charge was not accompanied by any further information as to what sort of a preference was wrongful under the bankrupt law, it is evident that the jury may have passed on the validity of the conveyance between the Spencers, as if it depended solely on the existence of such actual fraud as would suffice to defeat it, without reference to the bankrupt act. It is equally evident that the jury may not have passed on the question of whether Gandy & Son bought the goods with notice of facts, which would defeat their title, because that question depended on the other which preceded it. Various instructions on the subject of notice, which were appropriate under the bankrupt act, were asked and refused.

Because the court refused instructions necessary to the proper determination of the issue of property, and because the verdict for damages may have been based on the conclusion of the jury, that the property in the goods was in Gandy & Son, the judgment must be reversed.

In reversing the judgment on this ground, no opinion is intimated as to whether the writ of seizure justified an entry into the storehouse of Gandy & Son, by breaking the door, nor yet, upon the further question as to whether, in the event the goods were seized after an illegal entry, the property in the goods could still be shown in mitigation of damages.

The first assignment of error relates to questions which will probably again recur on another trial, and should be noticed.

Objections were made to interrogatories, on the ground that they were leading, and on the ground that the answers were conclusions of law; and the court refused to entertain them, because they were not taken in writing before the

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commencement of the trial. Such objections to interrogatories and answers are not of the class which go only to the form and manner of taking the depositions, and are not therefore required to be made in writing and before the trial.

The witness Duke was asked to "state whether or not the transfer of said goods was a fair and just transaction in payment of said debt," and answered: "The transfer was fair and just, to the best of my knowledge and belief." We think that this question and answer were alike objectionable, as calling for, and eliciting the conclusion of the witness as to a matter of opinion or of law, and not as to any distinct fact.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

ROUNTREE & GREEN v. ROBERT WALKER.

1. JUDGMENT—INJUNCTION.—A judgment rendered by a justice of the peace, which is not appealed from, and which directs a forced sale of articles for its satisfaction, which are exempt under law from forced sale, is not a nullity, however erroneous; and when no means have been used to correct the error by appeal, the conclusive force of the judgment cannot be evaded by a resort to injunction.
2. DAMAGES.—A suit may be maintained in the District Court for damages for the wrongful and malicious levy of a writ of sequestration, when the amount claimed exceeds the jurisdiction of the magistrate; and this, though the judgment of the magistrate ordering that the property seized should be sold, stands in full force and not appealed from.
3. DAMAGES—PLEADING.—In a suit for damages claimed for the wrongful and malicious suing out and levying a writ of sequestration, the plaintiff should plead and show, what affidavit was made by the defendant to obtain the writ, and negative the truth of it. If no such affidavit was made, that fact should be stated, and that the writ was issued at the instance of the defendant.
4. OFFICER—DAMAGES.—No recovery can be had against an officer for malicious use of process, who, when directed by a magistrate,

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levies a writ of sequestration on property, unless it is alleged and proved that he conspired with or instigated the plaintiff in the malicious issuing and levy of the writ.

APPEAL from Titus. Tried below before the Hon. J. H. Rogers.

George T. Todd, for appellants.—When a legal remedy exists, injunction is not proper. (2 Story Eq., sec. 887; *Marine Ins. Co. v. Hodgson*, 7 Cranch, R., 332; *Truly v. Wanzer*, 5 Howard, 142.) On third assignment, see *Drake on Attach.*, sec. 170; *Reidhar v. Berger*, 8 B. Monroe, 160.

S. O. Moodie, also for appellants, cited *Musgrove v. Chambers*, 12 Tex., 32; *Pryor v. Emerson*, 22 Tex., 165; *Crawford v. Wingfield*, 25 Tex., 415, 416; *Meniffee v. Myers*, 33 Tex., 691; *Robinson v. Sanders*, 33 Tex., 776. On the subject of damages, he cited *Brown v. Tyler*, 34 Tex., 172, and *Taylor v. Hall*, 20 Tex., 216.

No brief for appellee is found.

ROBERTS, CHIEF JUSTICE.—Appellee brought a suit in the District Court, to recover damages against Green for wrongfully and maliciously suing out a writ of sequestration, and against Rountree, as constable, for levying the same upon one hundred and ninety-eight bushels of corn, which is alleged to have been exempt from forced sale for the payment of his debts, by being, when levied on, all the corn he had, and not more than was sufficient for home use and consumption by himself, wife, and six children, together with his cattle, hogs, and horses; and which corn had been condemned and adjudged to be sold by a judgment rendered by a justice of the peace in Titus county, in a suit brought by said Green against said Walker, on an account for the price and value of a horse, plow, and gear, and labor done. In this suit, in the District Court, Walker prayed for and

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obtained a writ, enjoining the said defendants, Green and Rountree, from selling said corn in the execution of said judgment of the justice of the peace, and also prayed a judgment for the recovery of the said corn so levied on and adjudged to be sold in satisfaction of said debt. The ground upon which the writ of sequestration was issued by the justice does not appear either in the pleadings or in the evidence. Nor does it appear why Walker did not appeal from the judgment of the justice of the peace, rendered against him for \$49.75, and condemning the corn as liable to be sold in payment of the judgment.

The defendants, Green and Rountree, moved to dissolve the injunction, and excepted to the sufficiency of the petition, which motion and exceptions were overruled. They answered by a general denial, and by stating various other matters setting up a claim of lien upon the corn by contract, which claim of lien the court adjudged to be insufficient, upon exceptions of plaintiff.

On the trial, the main matter of controversy, as appears by the evidence adduced on each side respectively, seemed to be whether or not the corn levied on and adjudged to be sold by the justice of the peace, was exempt from forced sale to pay said debt so adjudged against Walker in favor of Green, which judgment was still standing in full force, and not appealed from. The jury returned into court the following verdict: "We, the jury, find for plaintiff two hundred and thirty-five dollars and costs of suit." Upon this verdict, the court rendered a judgment to the effect that the injunction be perpetuated; that Walker should recover the whole of the corn, which was adjudged to be his property, and that he recover from the defendants, Green and Rountree, the sum of money assessed by the jury, \$235.

From the result reached, it is obviously not necessary to enumerate and discuss the numerous objections to the charge and rulings of the court, to the verdict of the jury, and to the final judgment rendered thereon, as contained in the motion

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for new trial, and in the assignment of errors, which are amply sufficient to embrace the errors in the record.

The petition states no equitable grounds for collaterally attacking and virtually setting aside the judgment of the justice of the peace, which was the object of this suit, and which was attained in the result. However erroneous that judgment might have been, it was not a nullity. Walker had a plain legal remedy, by appeal, to relieve himself from any error in it. Having submitted to it, he cannot evade its conclusive force by a resort to equity. The injunction, therefore, should have been dissolved, upon the motion of defendants.

The exceptions of defendants, to the petition, so far as they sought to review, in this suit, the validity of the justice's judgment, should have been sustained. It follows, that so much of the judgment as perpetuated the injunction, and adjudged the corn to be restored to Walker, as his property, was erroneous.

That part of the petition which sought to recover damages for the wrongful and malicious suing out and levying of the writ of sequestration, stands on different grounds. Such a suit is maintainable, although the judgment of the justice of the peace stands in full force. Walker was not compelled to claim damages, in reconvention, in the suit before the justice of the peace. If they were of an amount sufficient to give the District Court jurisdiction, he had a right to sue for them, in a separate action, in that tribunal.

In such suit, however, he should show, by proper allegations, what affidavit was made by Green to obtain the writ of sequestration, and negative the truth of them; or, if no such affidavit was made, that fact should be alleged, so as to put in issue the wrongfulness or illegality of the writ. Usually, such an affidavit is the evidence that the writ was issued at the instance of the plaintiff in the suit. If no such affidavit was made, then it should be alleged, and otherwise shown, in evidence, that said writ was issued at the instance of the

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plaintiff in the suit. The petition is deficient in that particular.

As to Rountree, who is sued as an officer, it is not perceived, from anything stated in the petition, as to him, how he could be held responsible, in this suit, for malicious use of the process, on account of his official conduct, in executing the writ, unless it had been alleged and proved that he conspired with or instigated Green, in the malicious issuing and levying of the writ of sequestration. This was not done, and still the judgment is rendered against him, equally with Green, for the amount of money assessed by the jury, which, also, is erroneous.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN R. FAVER v. D. T. ROBINSON.

1. **VARIANCE—IDEM SONANS.**—A petition, citation, and service on John R. Favers will not support a judgment by default against John R. Faver.
2. **VENDOR'S LIEN—PLEADING.**—A petition alleging the execution of a promissory note by the vendee and others, for the purchase-money of land, is insufficient to support a judgment enforcing the vendor's lien against such land.
3. **SAME—WAIVER.**—Where the vendor of land takes a distinct and independent security, either of property or of the responsibility of third persons, he will be considered to have waived the lien which equity infers from the sale on credit, unless it appears that he reposed as well upon the lien as upon such other security.
4. **SAME—PLEADING.**—Where the lien is claimed in addition to such other security, it must be alleged and proved that the lien was not waived by the taking of such other security.
5. Distinguished from *Cartwright v. Chabert*, 3 Tex., 261, and *Tryon v. Butler*, 9 Tex., 553.

ERROR from Delta. Tried below before the Hon. W. B. Andrews.

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D. T. Robinson brought suit in the District Court against John R. Favers, R. H. Bennett, and Frederick W. Miner on a promissory note executed by Faver, Bennett, and Miner, to Delta county, and by the county assigned to plaintiff, for lot No. 5, in block 17, of the town of Cooper, sold by the county authorities to said John R. Favers. Judgment was asked for the amount of the note, and that the vendor's lien upon said lot be enforced.

Citation was issued, and service had on Favers and the other defendants.

Judgment final by default was rendered for the amount due on the note, and enforcing the lien and against John R. Faver.

Faver, Bennett, and Miner brought the case by writ of error to this court for revision.

Frederick W. Miner, for plaintiffs in error, cited *Hall & Jones v. Jackson*, 3 Tex., 310; *Malone v. Kaufman*, 38 Tex., 457; *Cannon v. Bonner*, 38 Tex., 491; *Parker County v. Sewall*, 24 Tex., 239; *Houston v. Musgrove*, 35 Tex., 597..

S. W. Stewart, for defendant in error.

MOORE, ASSOCIATE JUSTICE.—The petition in this case does not warrant the judgment. Suit was brought against John R. Favers. The contract upon which the action is founded is alleged to have been made with Favers. The citation issued to Favers, and the sheriff's return shows that Favers was the party upon whom it was served, while judgment is rendered against John R. Faver. Evidently, it cannot be said that there is such similarity in the name of the defendant, as shown by the petition and citation and in the judgment, as to make the doctrine of *idem sonans* applicable in this case. Nor does the fact of the note, which was signed by Faver, being an exhibit to the petition, warrant our holding, in support of a judgment by default, that there was a mere clerical mistake in the spelling of the name of the defendant in the petition and citation, and that Faver, against

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whom the judgment was entered, was the defendant named in the petition, and the party upon whom the sheriff served the citation.

This is altogether a different case from *Cartwright v. Chabert*, 3 Tex., 261, and *Tryon v. Butler*, 9 Tex., 553, cited by counsel in error in support of the judgment.

The case of *Cartwright v. Chabert* holds that after plea in abatement for misnomer of the plaintiff the mistake in the name may be corrected by amendment; and *Tryon v. Butler* decides that, although the record shows that a mistake in the name of the plaintiff had been corrected by amendment, it is not error to take judgment by default without service of the amendment upon the defendant. There was no question in either of these cases as to service of the citation upon the defendant. In the first the defendant was before the court contesting the plaintiff's right to correct by amendment the mistake in his petition. In the second the defendant had been duly served, and his failure to appear, it was said, could not deprive the plaintiff of the right of correcting the petition by any legitimate amendment. If Faver was in fact the party upon whom the citation was served, and the mistake in the name in the petition and citation had been corrected, the question would have been altogether different from what it is. If there is a mistake, it has not been corrected. As the case comes before us, we are called upon to say whether a petition, citation, and service against Favere warrants a judgment by default against Faver; and we are clearly of opinion that it does not.

There is another ground upon which the judgment should be reversed. The facts alleged in the petition are not such as to warrant a decree for the sale of the lot described in satisfaction of a vendor's lien for the purchase-money. It is distinctly alleged in the petition that the joint and several promissory notes of the vendee and Bennett and Miner was given for the amount which the vendee was to pay for the lot. This, as has been heretofore decided by this court, is

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certainly *prima facie* evidence of the waiver of the vendor's lien, and throws upon the vendor the onus of proving, by satisfactory evidence, that it ought not to have that effect. (Parker County v. Sewell, 24 Tex., 238.) When the vendee "takes a distinct and independent security, either of property or of the responsibility of third persons," he will be considered to have waived the lien which equity infers from the sale on credit, unless it appears that he reposed as well upon the lien as upon such security. The petition in this case states facts which raise a presumption of a waiver of the lien, and there is no averment which, in the slightest degree whatever, tends to rebut this presumption. Indeed, it is not even alleged that either the vendor or the plaintiff had a lien, except inferentially, in the prayer for judgment.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

CORA A. POOL v. E. H. CHASE & Co. ET AL.

1. **FRAUD—SEPARATE ACKNOWLEDGMENT OF MARRIED WOMEN.**—A married woman cannot avoid a deed to which her separate acknowledgment appears to have been taken by a competent officer, in the terms of the law, on account of the deception and fraud practiced on her by her husband in procuring her signature; or the failure of the officer to acquaint her with the contents of the instrument, in the absence of evidence tending to charge those claiming under the deed with notice.
2. **PAROL EVIDENCE.**—Parol evidence is admissible, to show that the articles enumerated in a receipt given by the agent of the creditor were never, in fact, delivered to the agent, and this, though the instrument on its face specified that the articles are "hereby turned over and delivered" to the agent.

APPEAL from Anderson. Tried below before the Hon. M. H. Bonner.

Statement of the case.

This suit was instituted by Cora A. Pool for two purposes:

1st. To set aside a deed of trust executed by appellant and her husband to E. H. Chase & Co., to secure the payment of three promissory notes, payable to Chase & Co., due in two, four, and six months after date, and dated 3d October, 1873, upon the ground that the deed of trust purports to bind the separate property of appellant to pay the debts of her husband; that said deed of trust was procured by the fraud of her husband; that the instrument was represented to her to be a mortgage for one thousand acres of land by her husband; that the officer who took her acknowledgment did not, in fact, explain the contents of the deed to her, she having stated to him, to save any explanation by the officer, that she understood the contents of the deed, when, in fact, she did not know its contents, supposing it to be a mortgage for one thousand acres only, when it was a mortgage on her whole league of land, less three hundred acres, and that she was thus deceived by her husband.

2d. That her husband, after the execution of said mortgage on her land, executed his chattel mortgage on eighteen barrels of whisky to E. H. Chase & Co., through their agent, A. G. Chantley, to secure the payment of the three notes, for the payment of which her land had been mortgaged; that said agent had disposed of said whisky, and had failed and refused to account for the value of the same; appellant prayed that E. H. Chase & Co. be compelled to account for the value of said whisky, and that a credit be allowed for the same on said three promissory notes. A writ of injunction was obtained, restraining the trustee, J. H. Reagan, from selling the land.

Appellees filed a motion to dissolve the injunction in the court below, which was sustained; appellant was permitted to amend her bill, and was allowed a hearing on the merits of the bill as amended. The amended bill alleged, that E. H. Chase & Co. and their agents combined and conspired with her husband to defraud her in the procuring of said

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mortgage on her separate property, and that J. M. Law, the officer who took her acknowledgment, was intoxicated at the time, and was the agent of appellees in the taking of her acknowledgment.

Appellant admitted that the mortgage deed and the certificate of authentication of her privy examination and acknowledgment were all in due form of law, but contended that the instrument was void for fraud in procuring it. There appears to have been no evidence on the trial in the court below, tending to connect appellees with fraud in procuring the deed of trust.

The following instrument was in evidence on the trial:

“STATE OF TEXAS, }
County of Anderson. }

“I, James L. Pool, desiring to more fully secure the payment of three notes of \$805.99 each, due and payable to E. H. Chase & Co., Louisville, Kentucky, due in three, four, and six months from date, the same being in the hands of Gaston & Thomas, of Dallas, for collection, and which notes were given for a bill of whiskies purchased by me in September, 1873, from said E. H. Chase & Co., I hereby turn over and deliver to A. G. Chantley, agent for E. H. Chase & Co., the following described whiskies, being the same purchased of said Chase & Co., as follows: (here follows their description;) which said whiskies are branded E. H. Chase & Co. The said whiskies, when sold, are to be applied to the payment of the above notes. The said E. H. Chase & Co. are to be at no expense in storage, drayage &c., nor responsible for leakage, or damages of any kind. This 20th day of November, 1873.

“(Signed.)

J. L. POOL.”

Indorsed as follows: “I accept the above for the purposes above expressed—day and date above written.

(Signed) A. G. CHANTLEY, agent for E. H. Chase & Co.”

Chantley testified that he received no benefit from the whisky; that it was shipped to Shreveport for J. L. Pool,

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and was then taken charge of by him and his agents, and that neither Chase & Co. nor the witness were to have any benefit from the whisky after its arrival at Shreveport.

The jury returned the following verdict: "We, the jury, find for E. H. Chase & Co., principal and interest, \$2,637.71." Judgment accordingly.

Twelve grounds for a new trial were stated in the motion filed, most of which were referred to in the assignment of errors; a statement of none of them is necessary to a proper understanding of the opinion.

T. T. Gammage, for appellant, cited *Brown v. Horless*, 22 Tex., 645; *Haldeman v. Chambers*, 19 Tex., 39; *Swisher v. Grumbles*, 18 Tex., 177.

Greenwood & Gooch, for appellees.

GOULD, ASSOCIATE JUSTICE.—There was no evidence whatever tending to charge appellees, or their agents, with notice of either the deception and fraud, alleged to have been practiced on the plaintiff by her husband, or the alleged intoxication of the officer who took her separate acknowledgment, and his failure to read over and explain to her the deed of trust. In the absence of such evidence the certificate of the officer is conclusive of the facts therein stated. (*Hartley v. Frosh*, 6 Tex., 208; *Williams v. Baker*, 71 Penn. St. Rep., 482; *Louden v. Blythe*, 4 Harr., 532.)

The court did not err in ruling that, notwithstanding the admission in evidence of the instrument of date November 20, 1873, it was competent for appellees to show that the property which that instrument purported to turn over to appellees, for the purpose of securing or paying their claim, was never in fact received by them, but was appropriated by the husband of plaintiff. This instrument, at most, amounted to no more than a receipt, and whilst treating it as a receipt it was *prima facie* evidence of a payment; it was, like other

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receipts, open to explanation or contradiction by parol testimony. (*Stachely v. Peirce*, 28 Tex., 335.)

The question as to whether the plaintiff was entitled to the credit was fairly submitted to the jury, and the evidence was certainly sufficient to support their verdict disallowing the credit. The purport of the evidence is, that this instrument was a mere device, with which in fact appellees had no connection.

The assignment that the judgment does not follow the verdict, and is not authorized by the pleadings, is not well taken. The plaintiff claimed that she was entitled to a credit, and the verdict fixes the amount due on the notes, without allowing the credit claimed. So much of the verdict and judgment as refers to J. L. Pool, the plaintiff's husband, may be treated as surplusage, and certainly constitutes no ground of complaint by appellant. No moneyed judgment is rendered save for costs. The legal effect of the verdict and judgment is simply that the plaintiff is not entitled to relief against the enforcement of the deed of trust, and to ascertain, as she had sought to do, the amount of the debt for which the property conveyed in the deed of trust was liable to be sold.

No error is perceived in the judgment, and it is affirmed.

AFFIRMED.

J. W. HENDON v. W. N. PUGH.

SERVICE OF CITATION.—The sheriff's return on a citation to J. W. Hendon, the defendant in this suit, was as follows: "Came to hand January 21, 1876, and executed same day by delivering to J. N. Hendon in person a true copy of the written citation, together with a certified copy of plaintiff's original petition;" *Held*, That it failed to show with reasonable certainty that the citation was served on the defendant in the suit, and no judgment by default could be rendered against the defendant.

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ERROR from Hopkins. Tried below before the Hon. W. H. Andrews.

This was an action, brought by W. N. Pugh against J. W. Hendon, on two promissory notes, one payable to W. N. Pugh and the other payable to the order of W. N. Pugh, and to enforce a vendor's lien on the land described in the petition. Judgment by default was rendered against plaintiff in error for the amount of the notes, and enforcing vendor's lien, from which judgment a writ of error was prosecuted.

Payne & Putnam, for plaintiff in error.—There was no service authorizing a judgment by default. The return of citation must show that it was served upon the defendant. (*Roberts v. Stockslager*, 4 Tex., 307; *Brown v. Marqueze*, 30 Tex., 78; *Wilson v. Johnson*, 30 Tex., 499.) The return of the sheriff in this cause shows service upon J. N. Hendon, not J. W. Hendon.

King & Milam, for defendant in error.

GOULD, ASSOCIATE JUSTICE.—The sheriff's return on the citation for the defendant J. W. Hendon is as follows: "Came to hand January 31, 1876, and executed same day, by delivering to J. N. Hendon in person a true copy of the within citation, together with a certified copy of plaintiff's original petition." This return fails to show, with reasonable certainty, that the citation was served on the defendant in the suit. (*Brown v. Robertson*, 28 Tex., 557.)

As the judgment by default was taken without a proper return on the citation showing service on the defendant, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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DAVID SPENCER v. A. E. McCARTY.

1. **AMENDMENT—PRACTICE.**—The appropriate use of an amendment to the petition is to give a more full and clear statement of the cause of action alleged in the original; and a definite description of land, against which it is sought to enforce the vendor's lien, may be given by amendment.
2. **SAME.**—The defendant is bound to notice the filing of such amendments, and judgment by default may properly be taken without service of notice of filing.
3. **PRACTICE—VARIANCE.**—Where a note is copied into the petition, or attached thereto as an exhibit, there can be no variance when the note is offered in evidence.
4. **PLEADING.**—The "promise" to pay is sufficiently alleged where the execution and delivery of a promissory note are alleged, and the note made part of the petition.

ERROR from Cherokee. Tried below before the Hon. R. S. Walker.

The facts are given in the opinion.

Priest & Priest, for plaintiff in error, cited *Bledsoe v. Wills*, 22 Tex., 650; *Malone v. Craig*, 22 Tex., 609; 2 Tex., 310; *Chitty on Pl.*, 337, 338; *Hall & Jones v. Jackson*, 3 Tex., 310; *Davison v. League*, 16 Tex., 407; *Morrison v. Walker*, 22 Tex., 18.

Wilson & Bonner, for defendant in error.

GOULD, ASSOCIATE JUSTICE.—Alisthenis E. McCarty filed his petition against David Spencer, alleging that Spencer executed and delivered to him his promissory note set out in the petition as follows: "\$500. By the 1st day of January, 1874, I promise to pay Samuel M. Long, M. L. Long, A. E. McCarty, E. J. McCarty, and S. A. McKee, or bearer, the sum of five hundred dollars, in gold, with ten per cent. interest from date until paid, it being a part of the purchase-money for one hundred and ninety-three acres of land near Larissa, and known as the S. L. McKee's land, when received.

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This February 12, 1872," signed by David Spencer. The petition alleged that plaintiff was the holder and owner of the note; that it was due, and with the exception of a credit indorsed, remained unpaid after demand made, and prayed for judgment for the balance due with interest; "and that petitioner's vendor's lien upon said tract of land named in said note be foreclosed, and that said land be sold to satisfy said debt." The defendant Spencer was regularly served with citation, and at the ensuing term of court, the plaintiff, before taking judgment by default, filed an amended petition, making the note sued on a part thereof, and alleging "that the tract of land for which said note was given, and upon which he holds the vendor's lien, is more particularly described as follows, to wit: in the James Cobb survey, beginning, &c., giving a description of the land by its boundaries, and winding up thus: 'containing one hundred and ninety-three acres more or less, and being the said land conveyed to said David Spencer by Samuel M. Long, M. L. Long, A. E. McCarty, E. J. McCarty, and S. A. McKee, by deed dated 12th day of February, 1872, and recorded in said Cherokee county, in book A, No. 2, on pages 407 and 408, and the same for which said note sued upon was given by said defendant.'"

After this amendment, the plaintiff had judgment by default enforcing his lien on the land described in the amended petition.

It is claimed on the part of the plaintiff in error that the amended petition set up new matter, and made new issues; and that he was entitled to notice as he would have been if a new cause of action had been set up in the amendment. (*Morrison v. Walker*, 22 Tex., 18.) The purport of the amendment was merely to cure the defective statements of the cause of action in the petition, including the defective description of the land on which the lien was claimed. (*Id.*) It did not set up any new demand in addition to the debt and lien claimed in the original petition, but was confined to

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giving a more full and clear statement of the same cause of action, which is the appropriate province of an amendment. (*Scoby v. Sweatt*, 28 Tex., 713.) The defendant was bound to take notice of such an amendment without a new citation. (*Ward v. Lathrop*, 11 Tex., 292; *De Walt v. Snow*, 25 Tex., 321; *King v. Goodson*, 42 Tex., 81.)

In regard to the other assignments of error, it is sufficient to say that the note was both set out in the original and attached to the amended petition; that from the face of the note the promise to pay sufficiently appears; and that, with the note thus set out, there could be no variance growing out of the averment that the note was executed to the petitioner.

The judgment is affirmed.

AFFIRMED.

W. L. SLOAN v. J. W. BATTE.

SHERIFF'S RETURN ON CITATION.—A sheriff's return to a citation, failing to show the date of service, the record not showing when the citation was filed, is defective; presumption in favor of returns will not be extended beyond former decisions, and the provisions of the statute must be complied with.

ERROR from Harrison. Tried below before the Hon. M. D. Ector.

The facts are given in the opinion.

Turner & Lipscomb, for plaintiff in error, cited *Williams v. Downes*, 30 Tex., 51; *Thompson v. Griffis*, 19 Tex., 116; *Covington v. Burleson*, 28 Tex., 371; *Brown v. Robertson*, 28 Tex., 557; *Whitaker v. Fitch*, 25 Tex. Supp., 308.

Jones & Henry, for defendant in error.

GOULD, ASSOCIATE JUSTICE.—This was a judgment by default, and must be reversed, because there does not appear to have been proper service on defendant W. L. Sloan, who

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has brought the case here by writ of error. The sheriff's return on the citation, issued April 7, 1869, is as follows: "Received in office April 7, 1869. Executed on W. L. Sloan by delivering to him in person a certified copy of plaintiff's petition and true copy of the within citation."

This return is manifestly defective in failing to show, as the statute requires, the day when it was executed. (Paschal's Dig., art. 5121; *Williams v. Downes*, 30 Tex., 52; *Whitaker v. Fitch*, 25 Tex. Supp., 309.)

As the judgment by default was not taken until the year 1872, several terms of court after that, to which the citation was returnable, (in fact, the record shows two judgments by default, the last in 1873, and the writ of inquiry was not executed until 1874,) it is contended that the presumption is that the officer did his duty by serving the citation before the return-day, and that such service, though not sufficient to authorize a judgment by default at the return term, would be sufficient for that purpose at any subsequent term. If it appeared with sufficient certainty that the service was had whilst the citation was in force, and consequently that the only defect in the return was that it did not show that service was had full five days before the return-day, the position taken would perhaps be correct. The record, however, does not show that the citation was filed, nor when it was returned. For aught that the record shows to the contrary, the service may have been had after the return-day.

The presumption, that the officer has done his duty, may be urged in support of a defective return of service; but this court, commencing with the case of *Underhill v. Lockett*, 20 Tex., 130, has repeatedly indicated that presumption in favor of returns will not be extended beyond former decisions, and that the provisions of the statute must be complied with. (*Groves v. Robertson*, 22 Tex., 130; *Williams v. Downs*, 30 Tex., 52; *Brown v. Robertson*, 28 Tex., 557.)

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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THOMAS GRIFFETH ET AL V. HANKS & COLLINS.

1. **FRAUDULENT REPRESENTATIONS—NOTICE.**—Where a vendor represented that the subject of sale was free from incumbrance, save a small and inconsiderable balance of an amount, secured by a deed of trust on the property sold, which representation was false as to the amount, in an action for the purchase-money, that fact being shown, its effect is not impaired by showing that the vendee, having notice of the incumbrance, could have ascertained its amount by inquiry.
2. **NOTE PAYABLE IN PROPERTY.**—The obligation given for the purchase-money under such circumstances, and transferred to the holder of the prior lien, is, in an action by him, subject to the same defense as if owned by the original obligee.

APPEAL from Cherokee. Tried below before the Hon. R. S. Walker.

Griffeth & Wedge sued Hanks & Collins on nine obligations, for the delivery of lumber, executed to one J. C. Seydel, for the purchase-money of a steam mill and fixtures, which were indorsed by Seydel to plaintiffs.

Defendants answered that the purchase by them was induced by the false representations to them, made by Seydel, that the mill was free from incumbrances, except in a small sum—about \$600—which he would pay, when, in fact, the mill, &c., had been conveyed by Seydel, by deed of trust, to plaintiffs, before the sale to defendants, to secure the payment of a debt, and which deed of trust, having been enforced, by sale of said mill, the consideration failed, &c.

The court charged the jury (after stating the case) as follows: “Every false statement made, as to the facts, in making a contract, does not necessarily vitiate or avoid it; but where the matter of representation relates to a material subject of the contract, and forms an inducement to the making of the contract, it may have the effect wholly to annul and avoid the contract, unless, after the discovery of the fraud, the party who might complain, acquiesces in and adopts the contract, and proceeds to act upon it and recognizes its validity.

“Applying these principles to this case, if you are satisfied,

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from the evidence, that Seydel made the representations and statements, alleged in the amended answer, to the defendants, and if you also believe that the existence or non-existence of a lien or incumbrance upon the property formed a material inducement or consideration to the defendants in entering into the contract for the purchase of the engine, &c., and that the defendants relied upon the fact that there was either no incumbrance, or only a small balance due upon the deed of trust, which could be readily provided against, by satisfying it, such a state of facts would constitute such a fraud as would avoid the contract, provided those representations in fact misled defendants into making a contract, which they would not otherwise have made, and provided further, that the representations were in fact untrue and false.

“If, however, you believe, that before the final consummation of the contract, the defendants were informed that there existed an incumbrance upon the property, upon which a small balance was due, there could exist no fraud in the transaction, unless the amount in fact due, was in truth an amount exceeding considerably that which Seydel meant to imply. The term ‘small balance,’ is indefinite and relative, and you will necessarily, in construing the evidence, endeavor to judge, as best you can, as to the impression sought to be made on defendants, as to the amount due; and if you believe that Seydel meant to create the impression, and did do so, that the balance due was less than he believed the defendants would have been willing to take a risk against in buying, and if the balance due turned out to be in fact not the small balance which the defendants had reason to suppose it to have been, you will, in such case, find for the defendants.”

The jury found for defendants. Plaintiffs’ motion for new trial was overruled, and they appealed.

Wilson & Bonner, for appellants, cited *Chandler v. Von Reader*, 24 How., 444; *Austin v. Talk*, 20 Tex., 164; *Andrews v. Smithwick*, 20 Tex., 111; *Steagall v. McKellar*, 20 Tex.,

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265; 2 Kent, 484, 485; 2 Story's Eq. Jur., sec. 200; 2 Pars. on Cont., 270; Kerr on Fraud and Mistake, 77, 236, 239, 240, 252, and note 82; Rice v. McDonald, 6 Md., 403; Schermerhorn v. Gouge, 13 Abb. Pr. R., 315; White v. Seaver, 25 Barb., 235; Burton v. Wellers, 6 Litt., Select Cases, 32; Turner v. Lambeth, 2 Tex., 365.

No brief for appellees came to hands of the reporters.

MOORE, ASSOCIATE JUSTICE.—There is no error in the charge of the court of which appellant can justly complain. The material question in the case, on the issue of fraud, was not whether appellees had notice of the lien which appellant held upon the mill when appellees purchased it from Seydel, but whether or not the representations made to them by Seydel, in regard to this lien, were false, and fraudulently made for the purpose of inducing them to purchase the mill, and whether they were in fact deceived and misled by these representations. It is no answer to the charge made by appellees, that they were induced to purchase the mill by the false and fraudulent representations of Seydel, that there was but a small and inconsiderable balance of the amounts secured by the lien unpaid, and that he would pay this amount, and relieve the property from the incumbrance upon it—to say that appellees were informed that appellants held a lien upon the mill; and if they were not informed of the amount of the lien, they could have ascertained it by inquiry of appellants or their agents, at Dallas, or by an examination of the records there; that the notice given appellees was sufficient to put them upon inquiry; and if they failed to make inquiry, they should suffer the consequence. This is undoubtedly true in cases to which this rule is applicable, but it certainly does not apply to such cases as this. Appellants are not seeking to maintain their title to the mill as purchasers without notice of appellees' lien; but having surrendered the mill, they are now resisting the effort of appellants to collect from them, for

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themselves and Seydel, the amount which they had agreed to pay Seydel for it.

It plainly appears, from the evidence in the case, that the consideration for the obligations upon which the suit is brought, unless to a small extent, for the use of the mill while in appellees' possession, had wholly failed. The obligations being for the delivery of lumber, appellees were entitled to make any defense against them in appellants' hands that they could if they had been sued by Seydel; and it is certainly needless to say that he could not have forced them to pay for the mill, after it had been taken from them by reason of a lien given upon it by him prior to its sale to them, whether they had notice of the lien when they purchased or not. The most either Seydel or his assignees could claim of appellees would be the value of the use of the mill while in their possession. This, however, was not demanded of them in this action, and, possibly, did not exceed the amount paid by appellees before they were dispossessed of the mill.

The judgment is affirmed.

AFFIRMED.

J. M. KENNEDY v. ANNA MCCOY.

1. ACCEPTANCE OF SERVICE OF CITATION.—A party accepting service of the petition, and waiving process, does not thereby waive his right to defend the action.
2. DEFAULT—SAME.—Where service of citation was waived and the petition was not filed by the first day of the term, it was error to take judgment by default at such term.
3. *Glenn v. Shelburne*, 29 Tex., 125, approved.

ERROR from Harrison. Tried below before the Hon. M. D. Ector.

March 6, 1876, petition was filed by Anna McCoy v. J. H. Kennedy, in the District Court of Harrison county, in term

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time—the term having commenced 17th of January—on a promissory note, and to foreclose a mortgage upon real estate.

On the petition was indorsed the following:

“STATE OF TEXAS, }
Harrison County. }

“I accept service of the above and foregoing petition, and waive copy of the same and the notice required by law, this January 10, 1876.

“J. M. KENNEDY.”

On the same day the petition was filed, judgment by default was rendered for the amount due on the note, and for foreclosure of the mortgage against Kennedy.

Motion was made to set aside the judgment by default, for want of sufficient service, which was overruled.

Kennedy brought the case, by writ of error, to this court.

George L. Hill, for plaintiff in error.

Turner & Lipscomb, for defendant in error.

MOORE, ASSOCIATE JUSTICE.—In the case of *Glenn v. Shelburne*, 29 Tex., 125, it is held, that a defendant who has accepted service of the petition, and waived copy of the writ and all other process, does not thereby waive his right to defend the action, and has until the fourth day of the term to file his answer; and it was error, therefore, to render judgment by default, though service had been accepted, and copy of the writ waived by the defendant, more than five days before the commencement of the term at which the judgment was rendered, because the petition was not filed at least by the first day of the term.

The facts in this case are even stronger than in the case of *Glenn v. Shelburne*. In it, the default was not taken until more than four days after the filing of the petition. Here, the judgment by default was rendered on the day on which

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the petition was filed, which was more than a month after the commencement of the term.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

H. M. TRUEHART v. W. S. McMICHAEL.

1. **A JUDGMENT AS EVIDENCE.**—It is no objection to a decree of partition, when offered in evidence as a link to support plaintiff's title, that the proceedings upon which it was based are not shown, or that service on the parties is not shown, when the decree recites that the defendants were duly cited and made default.
2. **TENANT IN COMMON MAY MAINTAIN TRESPASS TO TRY TITLE.**—When suit is brought to recover land allotted to plaintiff in partition, his right to recover against a defendant showing no title, will not be defeated by showing the invalidity of the proceedings under which the partition was made.
3. **LIMITATION—CONTINUITY OF POSSESSION.**—When a defendant relies on the possession of others, anterior to his, to make out the term of ten years, required by art. 17 of the Statute of Limitations, he is required to show privity between himself and those whose possession he claims, as part of his title under the statute.
4. **SAME.**—See facts held to be insufficient to support the plea of ten years' limitation.

APPEAL from Hopkins. Tried below before the Hon. Green J. Clark.

H. M. Truehart, August 23, 1872, brought an action of trespass to try title to a tract of 687 acres of land in Hopkins county, against W. S. McMichael.

The defendant pleaded not guilty.

The petition, amended, set out, by metes and bounds, the land claimed, and the chain of title. September 5th, 1876, defendant amended, and pleaded ten years' adverse possession, claiming the land under the 17th section of the Statute of Limitations.

On the trial, September 6, 1876, the plaintiff read in evi-

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dence his title; which, as to all its links, was by the parties agreed to be valid, except that it was objected to a recorded copy of a decree of partition of the District Court of Galveston county,

“That the record of that judgment, as shown by the transcript, shows that the proper parties were sued, but that the transcript of the judgment does not show that the parties were before the court, or had been properly cited, so as to give the court jurisdiction over them; and (2) that the certificate of the clerk to the said transcript does not show that all the proceedings had in said cause were included.”

W. B. Shores testified, for the defendant, that in 1852 one Thomas Carroll came into the neighborhood of the land, and cleared a little field on a tract of land owned by one Nelson, adjoining the land in controversy. That Carroll was living on the land in question, or had built a little house on it, near a spring, and was living on it in August or September, 1853; had also cow-pen and garden on the land. Witness did not know when Carroll moved on the land. The first he knew of his being there was in August or September, 1853. Carroll did not cultivate any land on it in 1852. Carroll made the first improvement that was made on the land, and occupied it a year or more after witness first saw him on it, and left it in the last days of 1853, or first days of 1854.

Ellis Ragsdale moved on it next, in the fall of 1853, or in the spring of 1854; witness heard that Ragsdale bought it of one Lee. Ragsdale occupied it two or three years.

J. W. Irans went on it when Ragsdale left it. Irans made several crops there and left it, probably in 1871. Mrs. Kirkland went on it next. * * Defendant McMichael succeeded her, and has lived on it ever since.

In August or September, 1853, witness was at Carroll's house when he was on the land.

The testimony of O. S. Davis was as follows: “I was down at Carroll's in 1852, when he was living on the land in question; I think it was in 1852; it has been so long I can't recollect; I

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have nothing to fix the date by except some accounts at home. I have not examined the accounts; I think it was in the fall of 1852. He lived in a little log cabin near the springs. Carroll made a crop on the land, I think, in 1853. Ellis Ragsdale went on it next—think Ragsdale went there in the fall of 1853. Ragsdale was there two or three years. J. W. Irans went on it next. Never saw the house vacant. I lived at Sulphur Springs, ten miles from the land. The widow Kirkland went there next; I don't know how long she stayed there. McMichael, the defendant, succeeded her. He is living there now. When I first saw Carroll on the place he had a little garden in cultivation on the place; I think it was in the fall of 1852, probably September. My attention has not been called to this matter before until during this term of court. I have talked with defendant and his witnesses, and have recalled the facts as stated by me. I give them as my best recollection.”

T. J. Stribling testified: Witness knows the land and the defendant. Defendant lived on the land since January, 1871. Mrs. Kirkland lived there before. Defendant bought her improvements and possession in January, 1871, and paid her about \$100 for them. She bought the improvements of Irans and paid him a wagon valued at \$100 for them. Irans never claimed the land; he only claimed the improvements, and that was all he sold to Mrs. Kirkland. Irans was on the place in 1867, when witness first moved to the neighborhood. Since that time the place has been occupied without interruption.

McMichael, the defendant, testified that he had been in possession of the land about four years; lives about two hundred yards from the old Carroll house; bought of Mrs. Kirkland, in fall of 1870, or 1871, her possession, and paid her one hundred dollars in gold; have had possession ever since; moved in before Mrs. Kirkland left; bought her improvements and possession.

Plaintiff, rebutting, called James A. Weaver, whose testi-

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mony was as follows: "I had a conversation with defendant McMichael soon after he went on the land. He told me he had bought only the improvements that Mrs. Kirkland had on the land. I filed a certificate on the land in 1862, thinking it was vacant. In 1865 I came back from the army and found Irans on the land, and wanted him to pay me rent. He said he did not claim the land, but had bought only the improvements, and wanted me to pay for them. I refused to do so, but told him I must have rent. He said he would not pay rent, but would get off first. I told him not to get off; that I wanted him to stay on it and hold for me until I got my patent, and then we would settle about the rents and improvements. He agreed to this, and remained on the land a year or two afterwards. I found the land was not vacant, and abandoned my location. Irans at length sold his improvements to Mrs. Kirkland. I then went to see her, (before I found that the land was not vacant,) and told her she was on my land, and must pay me rent if she stayed there. She said she had only bought the improvements and laid no claim to the land, and that she would get off before she would pay any rent. Before she left I found that I could not get title to the land, and abandoned it."

Judgment was rendered by the court for six hundred and forty acres for the defendant, under his plea of limitations, and for his costs; and Truehart appealed.

S. J. Hunter, for appellant, cited *Patterson v. Withers*, 27 Tex., 491; *Burdett v. Silsbee*, 15 Tex., 604; *Alexander v. Maverick*, 18 Tex., 179; *Bullock v. Ballew*, 9 Tex., 500; *Ang. on Lim.*, p. 410, secs. 5, 7, 11, 12; *Kimbro v. Hamilton*, 28 Tex., 565; *Melvin v. Proprietors of Locks, &c.*, 5 Met., (Mass.), 15; *Overfield v. Christy*, 7 Serg. & Rawle, 177; *King v. Smith*, 1 Rice, 10; *Williamson v. Simpson*, 16 Tex., 444; *Wheeler v. Moody*, 9 Tex., 372; *Christy v. Alford*, 17 17 How., 601; *Winn v. Wilhite*, 5 J. J. Marsh., 524.

Henderson & Henderson and *Joseph & Kittrell*, also for ap-

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pellant, cited 3 Wash. Real Prop., 123, 124, 125, 126, 127; 11 Cushing, 210; 37 N. H., 367; 20 How., 32; 13 Pick., 250; 26 Ga. R., 191; 34 N. H., 101; 18 Johns., 44; 37 Miss., 152; 28 Ga. R., 130; 2 Smith's L. Cases, (5th Am. ed.,) 566; Tyler on Ej. and Adverse Enjt., 911, 913, 914; Simpson v. Downing, 26 Wend., 316; 5 J. J. Marsh., 524; Brandt v. Ogden, 1 Johns., 156; Smith v. Chapin, 31 Conn., 530; Guilbeau v. Mays, 15 Tex., 416; 17 How., 601; 20 How., 29.

C. Payme, for appellee, discussed the authorities cited by appellant, and insisted that the verdict must be sustained, unless it clearly appears to be wrong, citing *Powell v. Haley*, 28 Tex., 53; *Ranger v. Harwood*, 39 Tex., 140; *Cochrane v. Faris*, 18 Tex., 850; *Kinney v. Vinson*, 32 Tex., 125; *Horton v. Crawford*, 10 Tex., 382; *Charle v. Saffold*, 13 Tex., 94; *Melton v. Turner*, 38 Tex., 81.

MOORE, ASSOCIATE JUSTICE.—This is an action of trespass to try title, brought by appellant H. M. Truehart against appellee W. S. McMichael, for six hundred and eighty-seven acres of land in Hopkins county, patented to John S. Thorn, assignee of Dolores Padillo.

On the trial of the case in the District Court, the defendant admitted that the chain of title, upon which plaintiff relied to maintain the action, was perfect, except the copy of the judgment of the District Court of Galveston county, in the case of Henry M. Truehart v. Martin A. Otis and others, relied upon by plaintiff, to show that the title to the land for which he sues is vested in him in entirety. The objections urged by defendant to the copy of the judgment and decree of partition are:

1. That all the proceedings had in said cause are not certified to by the clerk with said judgment. This was unnecessary. It is by and through the judgment and decree that the interest of the defendant in the land is vested in the plaintiff.

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iff. An exemplification of the judgment roll would be required if the correctness of the judgment was under review, on error or appeal, in an appellate tribunal. For in such case the proceedings which go to make up the record or judgment roll must be looked to in determining whether there is error in the judgment. But when the judgment is adduced as evidence in a collateral proceeding, the rule is altogether different; then the judgment cannot be attacked for errors or irregularities, if the court has jurisdiction of the parties and subject-matter with which it deals. Hence it is the judgment, and not the proceedings had in the case, which must be adduced by the party relying upon the judgment as a muniment of or link in his chain of title. If there is anything in the proceedings in the cause of which the opposite party may avail himself, he should show it; but he cannot require that his adversary shall introduce it in evidence for him. The statute requires the decree of partition, or the judgment by which title to land is recovered, to be recorded before it can be received in evidence in support of a right claimed by virtue thereof, but does not require the record of all the proceedings in the cause. (Paschal's Dig., art. 4710.)

2. It was also objected that the judgment does not show that the proper parties were before the court, or that they had been properly cited so as to give the court jurisdiction over them. This is a mistake. The judgment entry says: "The defendants, though duly cited, came not; but made default." This shows that the court considered the question of service, and determined that the defendants were duly served, and were in default by their failure to appear and answer the plaintiff's petition. If such recitals in domestic judgments are not to be held of absolute verity, when the judgment is relied upon in a collateral proceeding, they are certainly to be taken as *prima facie* true, and are undoubtedly sufficient to support the judgment rendered upon them. (Freem. on Judg., sec. 130, *et seq.*) But if these objections to this judgment were well taken, it would be of no impor-

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tance in this case. By the admission of the defendant, the plaintiff had shown a perfect title to an undivided interest in the land for which he sues. He was, therefore, as has been decided by the court, entitled to recover the entire tract from parties in possession without title. (*Alexander v. Gilliam*, 39 Tex., 227.)

The only claim set up by defendant to the land is under the 17th section of the statute of limitations. It is unnecessary for us to determine whether defendant's possession, or the possession of those from whom he claims to have acquired it, was of a character to enable him to claim the protection of this section of the statute for six hundred and forty acres of land, including his improvements, or even for that part of the tract of which there was actual possession, (*Word v. Drouthett*, 44 Tex., 365;) for evidently he utterly failed to prove possession of any part of the land for ten years by himself and others with whom he has shown any privity whatever. Admitting that Carroll, who was the first occupant, took possession ten years before the commencement of the suit, exclusive of the time not to be computed to complete the bar of the statute, (*Wood v. Welder*, 42 Tex., 396,) though this is by no means certain, there is no sort of privity whatever shown to exist between him and the defendant, or between the defendant and any of the occupants prior to Irans, which was unquestionably necessary to entitle him to claim any benefit from their possession.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

DAVID F. CASTLEMAN, FOR USE OF F. G. GOODMAN, v. BARNEY SHERRY.

1. LAND—EVIDENCE.—In a suit by a plaintiff to secure title to land for the use of one, to whom in his petition, it is alleged that he had sold it, the right of the party for whose use the suit is prosecuted to the

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land must be established by evidence other than the declaration of use to him in the petition, before a recovery can be had.

2. **JURY.**—Section 10, article V, of the Constitution of 1876, in regard to trials by jury, was not practically put in operation until the adoption of the act of August, 1876, regulating juries; there was no error in impaneling a jury, without requiring the jury fee to be first paid, at the request of a party, between the date of that act and the third Tuesday in April, 1876, when the Constitution became the organic law of the State.
3. **ADMISSIONS—EVIDENCE—STATEMENT OF FACTS.**—A statement of facts purporting to contain the testimony of a party to a suit in a former trial, but which was not signed by him, does not stand on the footing of admissions in writing, and is not admissible against him.

APPEAL from Red River. Tried below before the Hon. B. T. Estes.

This suit was brought by Castleman, for the use of F. G. Goodman, to recover a title to land on a verbal contract, alleging the payment of the purchase-money and valuable improvements made by the purchaser. Castleman, in his petition, alleged that he had, subsequent to his verbal contract for purchase, sold the land to one Goodman, but there seems to have been no effort to make Goodman a party to the suit. No exceptions were taken to the petition. The case was tried in May, 1876, after the Constitution of 1876 had gone into effect, which requires a jury fee to be paid by the party demanding one "for such sum and with such exceptions as may be prescribed by the Legislature," but before any legislative enactment under it. A jury was impaneled at defendant's request, without the jury fee being paid, and this was assigned as error. The testimony as to the completion of the verbal contract of sale was conflicting.

Verdict and judgment for defendant, from which Castleman appealed.

James H. Clark, for appellant.

ROBERTS, CHIEF JUSTICE.—The petition of Castleman, as plaintiff, stated that he had sold the land for which he claimed

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a title and recovery of possession from defendant, to Goodman, for whose use he sued, and still he did not make Goodman a party to the suit, either as plaintiff or as defendant, by the allegations or prayer of his petition. His prayer was for a decree passing title to Castleman or Goodman. The amended petition prayed for the further relief that the plaintiff might be invested with the title to the land, and the awarding a writ of possession to place the plaintiff in possession, but did not withdraw the allegation of disclaimer of title in himself.

The defendant did not except to this petition, but answered by a general denial, and by a special plea, which in substance amounted to a denial. Under such an issue, the petition not being excepted to, the court had no opportunity to pass upon the legality of such a suit in such a form.

The cause having been tried upon the issues of fact made by the parties themselves, the court held, as shown in the charge, that as Castleman had alleged title in Goodman by his (Castleman's) sale to him, the right of Goodman to the land must be established by proof, other than the declaration of use to him in the petition, before a recovery could be had in this suit. Admitting that such a suit so brought could be maintained, for which no precedent is shown to us, the charge seems to be quite reasonable and proper; for, if Castleman could bring a suit for title to land for the use of Goodman, it must be on the theory that Goodman was substantially the owner of it, as he had in effect alleged in his petition. Under this view of the case, the court charged the jury, at the request of plaintiff, that if it was shown that Castleman had acquired the title from Sherry, and Goodman from Castleman, they should find for the plaintiff.

It is evident that the court conformed his charge, as nearly as he consistently could, to the case set up in the pleadings of the plaintiff.

The evidence upon the issues made by the parties was conflicting, to some extent, in reference to the completion of

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the verbal contract of sale, and it was not proved that Goodman had paid for the land.

There is therefore no ground for disturbing the verdict of the jury.

As to the objection to the impaneling a jury without the jury fee being paid, it may be answered, that at the time of the trial, the Legislature had not regulated that subject, as contemplated by the Constitution, before it could be practically put in operation. (Const. 1876, sec. 10, art. V; Jury Law, Genl. Laws, 1876, Aug., 1876, sec. 17 page 81.)

The exceptions to a part of the statement of facts, made at a former trial, as evidence, were properly ruled on by the court. It was not shown that they were signed by the party so as to stand on the footing of admissions in writing, and were properly excluded by the court.

Judgment affirmed.

AFFIRMED.

J. F. BAXTER v. WILLIAM C. YARBOROUGH.

POWER OF ATTORNEY.—A power of attorney to sell and convey all lands owned in the State of Texas by the principal, invests the agent with power to sell any specific tract in the State to which his principal may have title.

APPEAL from Wood. Tried below before the Hon. Z. Norton.

Suit in trespass to try title brought by J. F. Baxter. On the trial the plaintiff sought to introduce a power of attorney, authorizing the attorney "to transact all business for me, and in my name, in the State of Texas, to sell all the land in said State which I now own, to execute all manner of deeds," &c., which was excluded from the jury on objection of defendant. On this ruling an exception was taken, and error assigned. The record discloses that the action of the court

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was based on the idea that the power was defective in failing to describe the land in controversy specifically.

Payne & Putnam, for appellant.

Banks & Carter, for appellee.

ROBERTS, CHIEF JUSTICE.—The only question in this case is, did the court err in excluding from the jury a power of attorney, under which one of the deeds in evidence before the jury was made, upon the ground, as shown by the bill of exceptions, that the land to be sold was not particularly described in the power of attorney. We think this was error. The power of attorney embraced any and all lands that might be owned by the principal in the State of Texas, and it was certainly not necessary to specify any particular tract of land in Texas to authorize the agent to sell it. No authority for such a rule of law has been cited, and it is believed none such could be found.

Judgment reversed and cause remanded.

REVERSED AND REMANDED.

LEWIS W. HEWITT v. JOHN T. THOMAS.

1. **SUIT BY PUBLICATION—PRACTICE—AMENDMENT.**—When by amendment an allegation is made of such a nature that the defendant should be served with notice, and such service was had by publication, there being no appearance, the proceedings will be considered as if in a “suit by publication,” and unless the record contain a statement of facts, such judgment will be reversed.
2. **SERVICE BY PUBLICATION.**—Since the “act of March 15, 1875, prescribing the mode of service in certain cases,” the affidavit of the person making such publication is required in addition to the return of the sheriff showing that the publication had been made.

ERROR from Kaufman. Tried below before the Hon. M. H. Bonner.

The facts appear in the opinion.

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J. J. Hill, for plaintiff in error.

I. There was no sufficient predicate in plaintiff's petitions to authorize citation by publication.

II. A prayer for citation by publication was necessary. (Sayles' Plead., § 70, and authorities there cited.)

III. There should have been a prayer for gold. (Paschal's Dig., 1427.)

IV. The service by publication was under the act of 1875. (Gen. Laws of 1875, p. 170.) The service was not complete. (*Burr v. Lewis*, 6 Tex., 76; *O'Conner v. Towns*, 1 Tex., 107.) There was no affidavit. Strict observance of this statute required. (*Edrington v. Allsbrooks*, 21 Tex., 186.)

V. There was no statement of facts. (Paschal's Dig., art. 1488; see authorities under this article.)

VI. The court had no jurisdiction. This suit was a proceeding *in personam* without personal service. Jurisdiction is acquired in case of non-residence of the defendant through the property; not over the person, but over the property. (*Herrington v. Williams*, 31 Tex., 457; *Ward v. McKinzie*, 33 Tex., 314; *Cooper v. Reynolds*, 10 Wall., 308; *Eaton v. Badger*, 33 N. H., 228; 2 McLean, 511.)

S. Robertson, for defendant in error.—The amended petition, declaring upon a mortgage, having been filed after defendant had answered, was not required to be served upon the defendant. (*De Walt v. Snow*, 25 Tex., 320; *Morrison v. Walker*, 22 Tex., 18.)

Article 25, Paschal's Dig., is not repealed by act of 15th March, 1875; and neither act requires the affidavit of the publisher to accompany the return.

GOULD, ASSOCIATE JUSTICE.—When this case was before this court on a former appeal, (37 Tex., 520,) it was held, that the defendant had no legal notice of the amended petition, setting up the mortgage. When the case was remanded, on this and other grounds, the plaintiff, whose pleadings there-

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tofore described the defendant as a resident of the county when suit was brought, made, by his attorney, an affidavit, dated April 28, 1865, that "the defendant, L. W. Hewitt, is a non-resident of the State of Texas," and thereupon citation, by publication, was issued and returned. We do not feel called upon, in this state of the case, to examine the record for the purpose of ascertaining whether the defendant was not in court, by his attorney, after the amendment was filed, and before the rendition of the judgment which was reversed. The record, which is before us, does not contain the first judgment, and there may be other matters omitted, which were embraced in the record as it was passed upon by our predecessors, and which affected their conclusion that defendant had no legal notice of the amendment. However that may have been, we think that we should pass upon the case as if it were in fact necessary, after its reversal, to cite the defendant to answer the amended petition, and as that citation was had by publication, so far as the enforcement of the mortgage is concerned, the judgment, which was by default, must be treated as rendered in a suit where service of process was made by publication only. In such cases, the statute requires that "the court should make out and incorporate with the records of the case a statement of the facts proven therein, on which the judgment was founded." (Pascal's Dig., art. 1488; *McFadden v. Lockhart*, 7 Tex., 575; *Davis v. Davis*, 24 Tex., 187.)

One of the errors assigned is, that the record does not contain any such statement of the facts proven, and as we find in the record nothing which purports to be such a statement, the judgment must, for this cause, be reversed.

Another assignment of error is, "that there is no sufficient return of citation by publication, there being no affidavit of the publisher, as required by statute."

This assignment is based on the provisions of an "Act prescribing the mode of service in certain cases," approved March 15, 1875, the very day on which the Legislature that passed

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it adjourned, and taking effect, under the general statute on that subject, sixty days thereafter. (Paschal's Dig., art. 4576.) At the time the citation issued, April 30, 1875, this statute had not taken effect, but, at the time it was returned, June 7, 1875, it was in force. Under the law in force when the citation issued, no affidavit of the publisher was required, and the return of the sheriff, showing that publication was made, was of itself sufficient. (Goodlove v. Gray, 7 Tex., 484; Blossman v. Letchford, 17 Tex., 649; Paschal's Dig., art. 25.)

The act of 1875 provides: "That any person made defendant to any civil suit may be cited by publication, upon the plaintiff, his agent or attorney, making affidavit that the defendant is a transient person, that his residence is unknown, or that he is a non-resident of the State of Texas." "Sec. 2. That said citation may be published in any newspaper published in the county where the suit is pending, and if there be no paper published in said county, then it must be published in the nearest paper to the county seat where the suit is pending. Said citation shall be published for four weeks prior to the sitting of the court, and no judgment shall be taken in said cause until the second term after the citation is served. The person publishing such notice shall make an affidavit, showing the length of time he published the same, and the return of the officer making such service must show how he executed the same; *Provided,*" &c., proceeding to authorize actual service, evidenced by the oath of the party making it, upon any other or non-resident defendant. This statute is imperative that the affidavit shall be made, and, whilst it does not in terms require that it be filed with the papers of the case, we think the evident meaning is, that it must appear, from the record, that the affidavit was made. The objection to the return of service is, under the statute, well taken.

It is not necessary, in this case, to decide what effect the act just recited, has upon the 13th section of the act of 1848,

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concerning proceedings in the District Court. (Paschal's Dig., art. 25.)

It is deemed proper, however, to say that the recent statute seems to use the expression "cited by publication" with reference to that character of citation which has heretofore been in use, and which is pointed out in article 25, Paschal's Dig., and further, that it is not believed that the act under consideration introduces any new rule as to the proper term of court at which to take judgment.

It is not necessary to notice other errors assigned, further than to say that they do not appear to be well taken. The position that, as both plaintiff and defendant were non-residents, the court could only acquire jurisdiction by the seizure of property, has been settled adversely in recent decisions of this court. (Battle, Heck & Co. v. Carter, 44 Tex., 485; Wilson v. Zeigler, 44 Tex., 657.)

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

J. J. AUSTIN v. AMANDA B. DUNGAN ET AL.

1. EVIDENCE.—Parties to a suit are not affected or bound by evidence, however conclusive it may seem to be, given in another case with which they had no connection, even if the record in such case showing such facts had been offered in evidence on the trial.
2. SURVEYS IN MERCER'S COLONY.—From the fact that a survey in Mercer's colony bore date May 8, 1846, it will not be presumed in favor of a colonist claim that the survey was void, or not upon a valid file made on the land before the law of 25th June, 1845, protecting from general location lands in Mercer's colony.
3. ABANDONMENT OF SURVEY.—A survey in Mercer's colony being in conflict with an older survey, patent thereon was refused on the field-notes; subsequently a resurvey was made of that part of the land not in conflict, on which patent was issued, the original field-notes not being found in the land office, and the register of their

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return showing an erasure of the original number of acres and the reduced number inserted instead: *Held*, That the resurvey was a presumptive relinquishment of that part not included in the resurvey.

4. **SAME.**—A subsequent appropriation by the original claimant should be initiated by a file or location in the county surveyor's office, and not by indicating a claim to it in the land office upon the original field-notes and surveys abandoned.
5. **POSSESSION OF UNLOCATED LANDS—LIMITATION.**—It was error to charge the jury that "by a survey and return of the field-notes and certificate to the land office the State was informed of the extent of the claim, and in that event possession for ten years would give title, upon which suit could be maintained for the land, unless the possessor had abandoned his claim under the survey."
6. **SAME.**—Nor will the continued occupation of such abandoned part confer title under the statutes of limitation, unless the land had been located by some other claim severing it from the public domain.
7. **POSSESSION OF PUBLIC DOMAIN.**—The State is not bound to evict parties unlawfully holding possession of public lands before granting them to others, there being nothing prohibiting the State from granting lands held in possession, the grantee from the State takes against the party in possession.
8. **TITLE BY LIMITATION.**—The court does not hold that where possession has been held under a location and survey for the time requisite to perfect title under the statutes of limitation, that such title could be defeated by the owner of the certificate fraudulently removing the certificate and abandoning the survey.

APPEAL from Rains. Tried below before the Hon. Z. Norton.

May 8, 1846, Graham located a conditional certificate for six hundred and forty acres of land in part on the two hundred and seventy-three acres in controversy in this suit.

September 28, 1853, W. B. Miller, the deceased husband and father of the plaintiffs, laid a Mercer's colony certificate on the same two hundred and seventy-three acres. He made a location of four hundred and fifty-eight acres, two hundred and seventy-three of which conflicted with the Graham survey.

April 7, 1856, Miller made a resurvey of one hundred and eighty-five acres, covering to that extent his former survey

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of four hundred and fifty-eight acres, and that part not in conflict with the Graham survey, and July 25, 1856, obtained a patent for it. The field-notes of the original survey seem to have been withdrawn from the land office, and the entry on the books of surveys returned show four hundred and fifty-eight erased and one hundred and eighty-five inserted.

In the spring of 1874, the plaintiffs obtained a duplicate certificate for the two hundred and seventy-three acres in conflict with the land in controversy in this suit, but afterwards they returned it to the General Land Office, and had it placed by the commissioner, June 24, 1874, in the Miller file, No. 2268.

February 4, 1873, the appellant located a certificate upon this land.

March 9, 1874, the plaintiffs, the surviving wife and heirs of W. B. Miller, brought this suit. They alleged that they were in possession of the Austin location, and that they feared Austin would get a patent; that his location was a cloud on their title; with prayer to have the Austin location declared null, and that they be quieted in their possession. Austin plead general denial.

March Term, 1875, it seems that there was a mistrial.

March 16, 1875, plaintiffs filed an amended petition, alleging the settlement of Miller and wife in Mercer's colony on the land in dispute, his improvements, his said location, &c., and that if there was any prior location on the land in controversy, the same was void, and assigned reasons therefor, and, among others, "Because, after the making of the Mercer colony contract, land in the colony was not subject to location, except by Mercer colonists."

They also alleged their possession of the land from the time of their settlement in 1846 adverse to the defendant and all the world, and that more than ten years had elapsed since such settlement, and they relied on the 17th section of the statutes of limitation.

The additional facts and the charge of the court are given substantially in the opinion.

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The jury found as follows: "We, the jury, find that plaintiffs are entitled to be quieted in their title to the land in dispute in consequence of their possession of the same for ten years preceding this suit."

Judgment was rendered on the verdict. Defendant's motion for new trial was overruled, and he appealed.

J. J. Hill, for appellant.—It is doubtful whether plaintiffs' petition shows any cause of action.

I. They did not institute proper suit. They could have maintained trespass to try title under art. 5303, Paschal's Dig.

II. The verdict of the jury was clearly against evidence. The legal effect of the resurvey of one hundred and eighty-five acres was an abandonment of the rest of the old survey. It was the province of the court to declare the legal effect of this resurvey, but having failed to do so, the jury could not attach other than its legal effect to it.

III. I am not able, with the limited investigation I have given the question, to perceive the correctness of that part of the charge which directs the jury that, if Graham failed to return his conditional certificate and field-notes to the General Land Office by August 1, 1857, his location became null. (Paschal's Dig., arts. 4573, 4574, 4575; see also Art. XIII, sec. 4, in regard to forfeitures, and *Hancock v. McKinney*, 7 Tex., 456.)

IV. The charge of the court, as regards the statute of limitation, was clearly erroneous. There is no doubt that the statute of limitation would run in favor of the plaintiffs in case of a valid location and survey, as against an adverse claimant, (*Kimbrow v. Hamilton*, 28 Tex., 560,) but not against the State. No doubt, if the plaintiffs' location was valid, the statute commenced to run in their favor from the time of such location, they being in possession, as against the Graham claim; but not against the State of Texas and all the world, nor against the defendant. In order that plaintiffs' adverse

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possession, as against Graham, could be counted against the defendant, there must be a privity between him and the defendant. There was no privity. Besides, the charge would indicate that the statute commenced to run in favor of the plaintiffs from the time of their settlement.

Miller's emigration and settlement in Mercer's colony gave him no right to any particular portion of the public domain.

D. W. Crow, for appellees.

1st. It is assigned as error for the revision of this court, that the court below erred in overruling appellant's general demurrer to appellees' original petition; this demurrer involves the question whether or not the facts set forth in said petition, regardless of form and regularity, constitute a cause of action, (Chitty's Pleading, 661; Gould's Pleading, 467; 1 Tex., 367; 2 Tex., 485; 5 Tex., 276, 582; 7 Tex., 517.) Appellees' original petition set forth and alleged a claim to the land in dispute, by virtue of a location and survey made by virtue of a valid certificate; and most clearly this was sufficient grounds to maintain a suit. (Paschal's Dig., 1st vol., 5301; 5 Tex., 480; 20 Tex., 635; 23 Tex., 29; 28 Tex., 560.)

2d. In 1849, the time that W. B. Miller and his wife, Amanda Dungan, one of these appellees, settled on the land in dispute, it was within the limits of the Mercer's colony, and not subject to any other location except a Mercer's colony certificate; (Paschal, vol. 1, 889; 21 Tex., 539; 25 Tex. Supp., 408;) and at the time that the surveyor of Nacogdoches county made the survey for Graham, in 1846, he had notice of the act of the 25th of June, 1845, above referred to. (Sherwood v. Fleming, 25 Tex. Supp., 408,) and there could be no legal excuse for the Commissioner of the General Land Office refusing to patent this land to W. B. Miller, under whom these appellees claim.

3d. There being a location, by virtue of a valid certificate, on the land in dispute, had Miller, during his lifetime, or

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have these appellees, since his death, abandoned the same? Every particle of evidence goes to show no such intention. Remaining on the land since 1849, paying taxes on the same, their repeated efforts to obtain a patent, their employing lawyers to obtain a patent, their allowing the certificate which had been located to remain in the land office, their determination to remain on the land on which most of them had been born, unless ejected by the strong arm of the law, go most clearly to prove to the mind, that there was no intention of abandonment; and without the intention, there is no abandonment. (38 Tex., 410.)

4th. The 14th section of the law of limitation, (Paschal's Dig., 4621,) unlike the 15th, 16th, and 17th sections of said act, does not exclude from its terms the State; and where no exception is made in favor of the State, she must pursue her remedy as other suitors. Miller, and those claiming under him, could not, by any lapse of time, under the 17th section of the law of limitation, have claimed six hundred and forty acres of land; but the amount, be it great or small, set out by definite bounds by a location and survey, under a valid certificate, with no intention of abandonment in ten years, under the 14th section referred to, would be a bar to the State under the presumption of a grant. (16 Tex., 305; 9 Tex., 378; 5 Tex., 414; 7 Tex., 288; 1 Greenl. Ev., sec. 40.) Now, in the case at bar, these appellees have been in possession and cultivating the land in dispute, by well-defined boundaries and lines, under a location and survey, by virtue of a valid certificate, with no intention of abandoning the same for more than twenty-seven years—now, in the language of Mr. Justice Walker, in *Turner v. Rogers*, 38 Tex., 584, where the appellee held under a continued possession and cultivation of the land for thirty years, “the right of entry to those laboring under no disability was certainly tolled long before the appellant entered upon the land; and under our law, the right of entry is not only tolled, but the right of action accrues to one who has been ousted of such possession.

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Our statute confers this right after ten years' uninterrupted adverse possession." (*Jones v. Borden*, 5 Tex., 410; *Lewis v. San Antonio*, 7 Tex., 288; *Morris v. Byers*, 14 Tex., 278; *Morris v. Brinlee*, 14 Tex., 285.)

MOORE, ASSOCIATE JUSTICE.—This suit was brought by appellees, to quiet their possession, and to remove a cloud cast by appellant upon their title to two hundred and seventy-three acres of land, by causing the same to be located and surveyed on the 7th of February, 1873, as vacant and unappropriated public domain, by virtue of a certificate for three hundred acres of land, issued by the Commissioner of the General Land Office to said Austin, as assignee of Isaac P. Langston, and the return of the field-notes of said survey, as corrected October 17, 1873, to the General Land Office, with the intention of obtaining a patent for said land, to which appellees claim to have a prior equitable title.

It appears from the statement of facts, that the two hundred and seventy-three acres of land in question is a part of a tract of four hundred and fifty-eight acres, surveyed on the 28th of September, 1853, for William B. Miller, the former husband of one of the plaintiffs and father of the others, issued to him as a colonist, in Mercer's colony. The field-notes of the survey, together with the certificate by virtue of which it was made, was shortly thereafter duly returned to the General Land Office. But on examination by the commissioner, on application for a patent, it was found that the survey conflicted, to the extent of two hundred and seventy-three acres, (the land now in controversy,) with a survey of six hundred and forty acres, made May 8, 1846, for J. F. Graham.

Appellees insist that this survey was illegal and void, and presented no valid objection to the patenting of the land to said Miller, because, as they say, it appears from the case of *Melton v. Cobb*, 21 Tex., 539, that the surveyor who made the survey had notice of the act of 25th of June, 1845, and knew the land was within the limits of Mercer's colony, and

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could not be legally surveyed on said Graham's certificate when he made the survey. But evidently the parties in this suit are not affected or bound by evidence, however conclusive it may seem to be, given in another case, with which they had no connection, even if the record of such case had been offered in evidence on the trial. If, however, it had been shown that the surveyor knew the land was within the limits of Mercer's colony when he surveyed it for Graham, it does not follow that the survey was illegal, and did not segregate the land from the public domain. For aught that is shown to the contrary, the land may have been appropriated by Graham, by a valid file of his certificate upon it, prior to the law authorizing its appropriation under the colonial contract with Mercer.

It further appears that Miller, finding that he could not get a patent for said four hundred and fifty-eight acres of land, for which he had caused the field-notes, together with his certificate, to be returned to the General Land Office, as aforesaid, on account of its conflict with said Graham's survey, on the 7th of April, 1876, caused a survey of that part of the land not in conflict with the Graham tract to be made, and the field-notes of the last survey to be returned to the General Land Office; and on the 26th of July, 1856, a patent was granted him for the land thus resurveyed.

The original field-notes of Miller's first survey for four hundred and fifty-eight acres, the commissioner testifies, is not now in the land office, and there is no record or memorandum in the office showing when or by whom it was taken out. But from the erasure in the register, showing the return of the certificate on the 23d of February, 1854, and that only one hundred and eighty-five acres were appropriated by it, instead of four hundred and fifty-eight acres, as originally entered, it is not unreasonable to infer that the field-notes of the original survey were withdrawn for correction, on account of the conflict with the Graham survey, and the field-notes of the second survey were returned to the

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office in their stead. The last survey was evidently received and acted on in the office, as the corrected survey of the land which Miller desired to appropriate by his certificate at that time. Whatever may have been Miller's purpose and intention, it cannot be held that the first of these surveys can be regarded as a subsisting and continuing appropriation of the entire land after he applied for and obtained the patent upon this resurvey; and although it appears from the deposition of the Commissioner of the General Land Office that the land appropriated by Graham's survey became a part of the public domain on the 1st of August, 1857, by his failure to comply with the provisions of the act of August 30, 1856, it does not appear that either Miller, in his lifetime, or the plaintiffs, since his death, by any action of theirs in the General Land Office or in the county surveyor's office, previous to the survey of the land for the defendant, indicated a purpose to appropriate or claim it under or by reason of the original survey.

The idea which seems to be conveyed in the charge of the court, that if the certificate and field-notes of the original survey were in the land office when the land became vacant, and Miller had not intended to abandon, but still insisted on his right to the land, he would be entitled to it, was unquestionably erroneous, and calculated to mislead the jury.

The resurvey and patent of a part of the land was a presumptive relinquishment by Miller to that part of it not embraced in the resurvey. A subsequent appropriation of it should be initiated by a file, location, or survey in the county surveyor's office, and not by indicating a claim to it in the General Land Office. If there were no adverse claimant, plaintiffs would have to cause a survey of it to be made by the county surveyor, and the field-notes recorded and returned to the General Land Office, before he could get a patent.

The plaintiffs having failed to appropriate the land by a valid file, location, or survey prior to its survey for defend-

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ant, must rest their right to the relief given them by the decree, upon their long possession of the land prior to its survey for appellant. The testimony shows that Miller settled with his family upon the land sometime in 1849, his dwelling and a part of his farm being on the one hundred and eighty-five acres survey, and the other part on the tract here in controversy; and that he and the plaintiffs have been in possession of the land located by appellant, by themselves and tenants, from that time until the trial of the case in the District Court. The actual possession by plaintiffs, it must be conceded, was sufficiently long to give title by limitation, if in view of the facts of the case their possession can be held to have this effect.

The charge of the court upon the question of limitation was certainly loose and indefinite. If we understand it, the judge intended to convey the idea that if a survey of the land had been made, and the field-notes and certificate returned to the General Land Office, the State was thereby notified of the extent of the claim; and in that event possession for ten years would give a title upon which such a suit as this could be maintained, unless it was shown that the possessor had abandoned all claim by virtue of such survey. To give the charge practical application to this case, we must suppose the court intended the jury to understand, if the State was notified of the boundaries of the claim, by the return of the field-notes to the General Land Office, it was immaterial whether the survey was legal or not; or that whether the right to be barred was in existence, or was subsequently acquired from the State, the party in possession would be entitled to the protection of the statute; for if the survey was valid and the land was vacant, unless it was afterward abandoned, the certificate and survey would give a title which would, not need the aid of the statute of limitations for its support; and if there was an existing adverse claim, possession, under the circumstances indicated, for less than ten years, would complete the bar. Hence, we suppose the court was of

the opinion that although the survey, by virtue of the certificate, was inoperative to sever the land from the public domain, or to confer any right upon the party claiming under it, beyond showing the extent to which he got possession by his entry, yet ten years' possession would give title, or bar any one subsequently acquiring it from the State.

If this was the idea intended to be conveyed, it is evidently erroneous. It is unnecessary for us to say that there is nothing in the decisions of this court to give countenance to the supposition that a grant of the public domain will be presumed from ten years' possession. Nor is there anything in the statutes, or in the practice and usage of the State, in the granting of land, to authorize the inference that the State must eject trespassers, or recover possession of the public land from occupants, before it can make a valid grant or conveyance of it to other parties. The common-law rule, that the owner cannot make a valid conveyance of land in the possession of a disseizor, is not recognized with us as between individuals, and certainly it has no application to the granting of land by the State. It follows, as a necessary consequence, that a purchaser from the State will not be barred; for it would be tantamount to a denial of the title of the State or its right to convey, to say that the bar, though not directly applicable to the State, would take effect immediately on the title vesting in the purchaser or grantee from it.

It is not to be understood, however, from what is here said, that when there is an existing title or claim to the land, against which limitation will run, that this title may not vest in the occupant by ten years' adverse possession; or that when the title has been thus acquired by limitation, it can be defeated by the original owners abandoning the location and survey, and causing the certificate to be re-located elsewhere.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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HUNT ET AL. V. ASKEW.

1. **AFFIRMANCE ON CERTIFICATE—PRACTICE IN SUPREME COURT.**—The act to regulate proceedings in the Supreme Court, of April 2, 1874, which provided that when a party is unable to file in the Supreme Court the transcript of a case, in the time limited by the statute, from any unavoidable cause, the court shall, upon satisfactory proof thereof, permit such transcript to be filed at a later period, conferred, in that, no new right, but was in accordance with the practice of the Supreme Court, founded on a former statute. (See Paschal's Dig., arts. 1589, 1590.)
2. **PRACTICE IN SUPREME COURT.**—Though the statute nowhere expressly authorizes or requires the appellee to file the transcript of a record at any time, it requires the clerk of the District Court to give to either party who may apply for it an attested copy of the record; and it has been the practice of the court to allow the appellee to file the transcript, when filed on or before the first day of the assignment without his right to do so being questioned; but if he fails to do so, no practice recognizes his right to file it afterwards, on showing good reason for not filing it sooner, as the appellant is authorised to do.
3. **CITED AND APPROVED :** Davenport v. Hervey, 30 Tex., 330; Hutchinson v. Owen, 20 Tex., 288; Reynolds v. Dechaumes, 22 Tex., 119.
4. **AFFIRMANCE ON CERTIFICATE—PRACTICE IN SUPREME COURT.**—When a complete transcript is filed by appellee, in place and as a substitute for a certificate, and it is found to contain those parts of a case which are required to be certified to in a certificate, it may be acted on by the Supreme Court as such; and for that purpose, may be filed without asking leave of the court.
5. **SAME.**—Either party has a right to apply for and obtain an attested copy of the record, and file it in the Supreme Court for its adjudication, within the time prescribed, but neither party has a right to rely on the other party to do it. Neither party is bound to file it after obtaining it, unless it should suit his own wishes to do so.

APPEAL from Smith. Tried below before the Hon. M. H. Bonner.

Jones & Henry, for appellee.

ROBERTS, CHIEF JUSTICE.—The assignment for Smith county commenced the 30th of October, 1876, and continued for two

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weeks. The appellants failed to file a transcript of the record in this case at the proper time to, wit, the 30th of October, 1876, and have not still filed it. The appellee presented a transcript on the 10th day of November, being within the two weeks, and moved that it may be filed and considered by the court; and having suggested delay, asked an affirmance of the judgment, with damages. Afterwards, on the 14th of the same month, appellee filed an additional motion, asking leave of the court to file the transcript of the record, and, as a reason for not having filed it on the first day of the assignment, submitted a sworn statement of the deputy district clerk of Smith county, that he had prepared the transcript, with the assignment of errors inserted, and delivered it to an attorney representing the appellants, before the first day of the said assignment. Counsel for appellee contend that they had no notice or reason to believe that appellants would not file the transcript of the record so taken out of the office of the clerk by appellants' counsel, and on that ground asked the court to act upon the transcript of the record as if properly filed in time, or, if that cannot be done, that it be acted on by the court as a certificate.

The fifth section of the act of 1850, "concerning proceedings in the Supreme Court," is amended by the eleventh section of "An act to regulate proceedings in the Supreme Court, approved 3d of April, 1874," in which several changes are made. The last act, as did the first, requires the appellant to file the transcript of the record on or before the first day of the assignment. One of the changes, by way of addition, is as follows: "*Provided, also*, That where a party is unable to file such transcript, in the time limited by this section, from any unavoidable cause, the court shall, upon satisfactory proof thereof, permit such transcript to be filed at a later period." (Gen. Laws, 1874, pp. 51, 52; Paschal's Dig., art. 1587.) This provision of the statute, though never before enacted in this connection, was substantially in accordance with the practice of this court, founded on the statute, which permitted appel-

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lant to file the record after appellee had filed a certificate for the affirmance of the judgment, upon the appellants showing "good cause" why the transcript was not filed in due time, which law is still in force. (Paschal's Dig., arts. 1589, 1590.)

This amendment simply gave express authority to the court to permit the transcript to be filed, upon certain proof by the appellant, when no certificate had been filed by the appellee, which had often been done by the court before its passage.

The statute expressly authorizes appellee to file a certificate, and procure an affirmance of the judgment, in the event that appellant fails to file the transcript, (Paschal's Dig., art. 1589;) but nowhere does it expressly require or authorize the appellee to file the transcript of a record at any time. It is, however, provided by statute, that, when an appeal is taken, "the clerk of the District Court shall immediately make a full and perfect record of all proceedings in such case, and shall, on application of either party, give to such party an attested copy of such record, with a taxation of all costs, and shall indorse on such copy the day on which it was demanded, and the day on which it was delivered, and sign his name as clerk thereto." The same section proceeds to impose a penalty on the clerk, if, by his delay or negligence, the transcript is not filed in the Supreme Court in due time, &c. (Paschal's Dig., art. 1494.) This would seem to contemplate the obtaining the attested copy, and the filing of it in the Supreme Court by either party, who might demand and receive it from the clerk for that purpose.

Accordingly, it has been the practice in this court for the appellee to file the transcript, when filed on or before the first day of the assignment, without his right to do so being questioned. If he fails to file it in due time, it is not believed that there is any established practice recognizing his right to file it afterwards, upon showing a good reason why he did not file it in time, as the appellant is authorized by the statute to do.

The appellee's rights, then, upon this subject stand thus :

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By implication from the statute, he has the privilege of filing the transcript of the record, when he files it on or before the first day of the assignment; and by express statute, he has the right to file a certificate if the appellant fails to file the transcript in the Supreme Court.

If the appellee should file the transcript in proper time, and the appellant should do likewise, it has been said that appellee's transcript being useless, it might be dismissed at his cost, and his right to file it would be subject to that contingency. (*Davenport v. Hervey*, 30 Tex., 330.)

In a case where the plaintiffs in error asked leave to withdraw the transcript, and assign errors, upon the ground that the defendant in error had prematurely taken it out and filed it in the Supreme Court, by which he was prevented from assigning errors, the court refused the motion, saying that they might have obtained another transcript of the record, with their assignments annexed thereto, and filed the same in this court. (*Hutchinson v. Owen*, 20 Tex., 288.) It might have been, as has been held, that he could file his assignments of error with the district clerk, and have them brought up by *certiorari* to perfect the record.

In another case it is said, after reviewing the statutes on this subject, "that either or both the parties have a right to apply for and obtain an attested copy of the record, and file it in the Supreme Court, for its adjudication, within the time prescribed. But neither party has a right to rely upon the other to do it. Neither party is bound to file it, after obtaining it, unless it should suit his own wishes to do so. (*Reynolds v. Dechaumes*, 22 Tex., 119.)

If the appellee should think the chance of obtaining damages for delay is worth more to him than the risk of losing the costs of his transcript, if appellant should also file a transcript, he has the privilege of filing the transcript on or before the first day of the assignment, otherwise he must rely upon filing his certificate for a mere affirmance of the judgment, if appellant fails to file the transcript. This is believed

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to have been the construction of the statutes upon the subject, and the practice of the court under them.

The motion to file the transcript of the record, to be regarded as a record, upon which damages, on affirmance, can be awarded, is refused.

When a complete transcript is filed, in place of and as a substitute for a certificate, by appellee, as has often been done, and it is found to contain those parts of a case which are required to be certified to in a certificate, it may be acted on by this court as such, and, for that purpose, may be filed without asking the leave of court.

APPLICATION REFUSED.

A. B. TURNER ET AL. v. PHELPS & Co.

1. **LAND—PURCHASER AT SHERIFF'S SALE.**—A purchaser of land at sheriff's sale, which was sold under a judgment for the purchase money due to one of several joint vendors, on an executory contract for the sale of the land purchased, (the other joint vendors having been paid.) takes title to the whole property, as against one having notice, and claiming under a mortgage executed by the original vendee.
2. **DISTINGUISHED.**—This case distinguished from *McDonough v. Cross*, 40 Tex., 551, and *Harrison v. Oberthier*, 40 Tex., 385.
3. **MORTGAGEE—HIS RIGHTS AS AGAINST PURCHASER AT SHERIFF'S SALE, WHEN NOT MADE A PARTY TO THE SUIT.**—If the holder of the junior mortgage has his mortgage on record before the institution of the suit to enforce the prior lien of the vendor, and is not made a party to that suit, he is not precluded from asserting his lien as against those who hold under the judgment; but in so doing, must satisfy their interest in the whole of the land, and not in a part only. The title of the purchaser is not, as against a subsequent incumbrance, absolute, under such circumstances.
4. **ESTOPPEL.**—An averment, in effect that the mortgage was worthless, made by the junior mortgagee in a suit against attorneys for damages alleged to result from negligence in examining title, does not

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estop him from enforcing any right resulting from the mortgage, the averment not being addressed to those claiming adversely, nor to any one else, to induce action on it in regard to the land.

APPEAL from Rusk. Tried below before the Hon. M. H. Bonner.

August 19, 1857, John C. Robertson, William Stedman, James H. Jones, and S. P. Hollingsworth were joint owners of two tracts of land lying contiguous, in Rusk county. On that day, they contracted, by their title bond, jointly to make a deed for said lands to Robert H. Cumby, so soon as he should have paid them \$1,500, for which he executed to them his promissory note, due December 25, 1858.

October 1, 1860, Cumby paid part of the purchase-money for the land above mentioned, leaving unpaid \$165.30, for which he executed to John C. Robertson his note of that date, and due one day thereafter.

October 29, 1866, Cumby owed Phelps & Co. (James E. Phelps and Rinaldo Phelps) \$3,305.06, for which he executed to them three promissory notes of that date, due one day thereafter. To secure the payment of these notes, he executed to them a mortgage on the lands above named. Before the execution of that mortgage, Phelps & Co. had employed William Stedman, an attorney at law, and then one of the law firm of Pope, Stedman & Pope, by their agent, Lake Newel. Stedman wrote the mortgage deed, and before its execution he informed Newel that John C. Robertson held Cumby's note for part of the purchase-money of the land, and thereby had a lien on the same.

At the trial of this cause, the appellees read an agreement, signed by counsel on both sides, to read in evidence a transcript from Harrison county, "subject to exceptions by either party to any part of it." That transcript contained all the proceedings in a suit brought by Phelps & Co. against Pope, Stedman & Pope, to recover damages for Stedman's negligence in his search to ascertain whether or not Cumby had a good title to the land above named. The petition of Phelps

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& Co., in that transcript, charged that at the date of the mortgage, Cumby had no title to the land, which Stedman could have known from the records in the office of the county clerk of Rusk county. That petition was filed November 23, 1868.

The agreement of counsel to read the transcript was filed May 9, 1874. The transcript had the seal of the District Court of Harrison county impressed upon it, after a proper certificate of the clerk of that court; but he failed to sign his name to that certificate. The plaintiff objected to the transcript, for want of the clerk's signature. Objection sustained, and defendants excepted.

April 9, 1869, John C. Robertson sued Cumby, to recover the amount of Cumby's note to him, and to enforce the vendor's lien on the land above named. In that suit he recovered, and had a decree subjecting the land to satisfy the judgment.

May 25, 1869, an order of sale issued, which was levied on the land May 28, 1869. The sheriff sold the land the first Tuesday in September, 1869, and Mrs. Adriana E. Spivey became the purchaser, for \$340.10, and received the sheriff's deed for the land. Mrs. Spivey, and her husband, D. F. Spivey, conveyed the land in several parcels, at different times, as follows: to A. B. Turner, January, 18, 1870; to said Turner, May, 21, 1870; to Thomas Ballenger, January, 1870; to C. G. Rogers, December 31, 1870; to Candy Sanders, May 25, 1872.

The above defendants had been informed by James H. Jones, attorney at law, before their purchases, that Phelps & Co. had denounced their security as worthless, as Cumby had probably sold the land before the date of the mortgage.

Cumby conveyed the land to George James, November, 12, 1865.

Defendants offered to prove, by A. B. Turner, that they purchased and entered upon the land on account of the information received by them from James H. Jones, and

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were acting in good faith; that they had made valuable improvements on their respective portions of the land, and had been living on the same before the bringing of the suit, to which the plaintiff objected; objection sustained, and defendants excepted.

When the court sustained the plaintiff's objection to the transcript from Harrison county, defendants asked leave to withdraw their announcement, which was refused, and defendants excepted.

At the August term, 1875, the death of R. E. Phelps was suggested, and the suit ordered to proceed in the name of James E. Phelps, the surviving partner.

Phelps & Co. brought this suit against R. H. Cumby, August 4, 1873, to recover on Cumby's notes to them, and to foreclose the mortgage.

Another petition was filed for the same purpose; and Turner, Ballenger, Rogers, and Sanders, were made defendants, as occupants of the lands.

The defendants, except Cumby, answered by a general demurrer and denial, and specially setting out a history of the matters above detailed—the suit by Phelps & Co. v. Pope, Stedman & Pope; the abandonment of the mortgage as a security; the judgment of Robertson v. Cumby; the sale under that judgment; the purchase by Mrs. Spivey; the sheriff's deed to her; the conveyance by her to these defendants; their good faith; valuable improvements, &c.

August 20, 1872, plaintiffs amended, charging fraud by Cumby and James in the conveyance by the former to the latter; that said conveyance was without consideration; fraud by Cumby and Robertson to defeat the mortgage; fraud by Mrs. Spivey and her husband, and Cumby, and these defendants, for the benefit of Cumby; that the defendants had notice of the mortgage when they purchased from Mrs. Spivey and her husband.

Amended answer charged plaintiffs with notice of Robertson's lien before the date of the mortgage.

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August 19, 1875, amended petition, alleging that the note to Robertson was for one-fourth of the purchase-money, and bore the same date with like notes to each of the other vendors, Stedman, Jones and Hollingsworth; that Cumby had paid all the notes except the one to Robertson; that Robertson's lien extended only to one fourth of the land; that Jones, Stedman, and Robertson and Hollingsworth had conveyed the land to Cumby by deed duly recorded.

August 21, 1875, amended petition withdrawn and abandoned; the amendment filed August 19, 1875, and reiterated what plaintiffs before had pleaded.

Plaintiff read in evidence Cumby's notes, and his mortgage to Phelps & Co.

The defendants offered in evidence the deed from Cumby to James, to which the plaintiff objected; objection sustained, and defendants excepted. The other facts proved by the defendants have been already detailed.

Among other matters, the court charged: "In the opinion of the court, the defendants do not set up an estoppel.

"If, however, they (the defendants) have so shown the same," (*i. e.*, that the note to Robertson was for part of the purchase-money,) "then, under the evidence in this case, and the note being made payable to Robertson alone, the court could legally have enforced the lien for an undivided one fourth of the land only; and in no event, if the plaintiffs have introduced said note and mortgage in evidence, can you find for the defendants more than an undivided one fourth of said land."

The jury found three fourths of the land, subject to the mortgage. Judgment entered accordingly.

The defendants asked two special charges, in effect, that if Cumby's note to Robertson was for a part of the purchase-money of the land, and Robertson had an undivided interest in said land, and obtained a decree condemning all the land to pay said note, and there was a sale under that decree, and Mrs. Spivey purchased and conveyed the

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same to these defendants, they are entitled to recover all the land. Refused. Defendants excepted.

Motion for new trial overruled. Defendants excepted, and appealed.

Assignment of errors, in effect :

1. Sustaining objection to the transcript from Harrison county.
2. Sustaining objection to A. B. Turner's evidence.
3. Deciding that defendants had not, in pleading, set up an estoppel.
4. Sustaining objection to Cumby's deed to James, and charging that the same should be disregarded.
5. Stating that Robertson's lien extended to the one fourth of the land only.
6. (Included in 3d assignment.)
7. Refusing the charges asked by the defendants.
8. Overruling the motion for a new trial.
9. Directing the jury, in effect, to find for the plaintiff.
10. Refusing the defendants leave to withdraw their announcement.

Martin Casey, for appellants.—The court says, in his charge: “Then, under the evidence in this case, and the note being made payable to John C. Robertson alone, the court legally could have enforced the lien for an undivided one fourth of the land only; and in no event, if the plaintiffs have introduced said note and mortgage in evidence, can you find for the defendants more than an undivided one fourth of said land.” This was effectually instructing the jury to find for the plaintiffs, and assuming to know and tell them what the evidence was and the effect and weight of that evidence.

The doctrine of marshaling assets has no application in this case. There was but one incumbrancer, Robertson, and but one fund from which to enforce payment; that was the land. Cumby gave no additional security from which a distribution or waiver of his lien could be inferred. After

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Cumby had paid a part of the purchase-money, the other vendors could have transferred their interest in the original note of \$1,500 to Robertson, and the lien would follow that note. Surely it could make no difference to Cumby whether suit should be brought on the original note for the balance due thereon or on the note given by him for that balance. The consideration remained the same. "The lien prevails against a purchaser from the vendee, with notice that the latter gave a promissory note, which is unpaid, for a part of the purchase-money." (3 Parsons on Cont., 278; 2 Story's Eq., sec. 1226.)

In *Winter v. Lord Anson*, 3 Cow. English Chan. R., 495, (3 Russ., 488,) Winter conveyed real estate to Mouseley, who paid part of the purchase-money. Winter made Mouseley a deed, in which he acknowledged the payment of all the purchase-money, and took Mouseley's bond for the remainder, the principal of which was to be paid after Winter's death. The bond bore interest, payable annually. Mouseley being in default for interest, Winter sued him and obtained a verdict. Mouseley became bankrupt, and his assignees sold the land to Lord Anson. The main question was, did the vendor's lien attach to the land? The Lord Chancellor decided that it did, and should be enforced. He says, (p. 497:) "As in this case there was no agreement for the extinguishment of the lien, and as, in my judgment, there is nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest inference that such was the intention of the parties, I think it should be declared that the plaintiffs have a lien upon the estate in question for the residue of the purchase-money." When a vendor takes the vendee's note for the purchase-money, and afterwards receives a part and takes another note of the vendee for the remainder, payable at a future day, the vendor's lien may be enforced on the second note. (*Alridge v. Dunn*, 7 Blackf., 249.) "There is a natural equity that the land should stand charged with so much of the purchase-money as was not paid,

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and that, without any special agreement for that purpose;” *i. e.*, all the land, and not a proportional part. (Briscoe v. Bronaugh, 1 Tex., 326.)

There was a judgment of a court of competent jurisdiction condemning the land. It was sold under that judgment. Mrs. Spivey purchased and paid for it, and conveyed it to the defendants. The plaintiffs had actual notice of Robertson’s lien, and constructive notice of the deed to James, and of the suit by Robertson against Cumby. The plaintiff declared, by matter of record, that their mortgage was worthless. The defendants were informed of all these facts, and therefore were innocent purchasers. Foreclosing the mortgage under such circumstances, operated a gross fraud on the part of the plaintiffs.

Drury Field, for appellees.—The court below did not err. Robertson, Jones, Stedman, and Hollingsworth purchased jointly this tract of land, and sold it to R. H. Cumby, each vendor taking from Cumby a note for his share of the purchase-money, being one fourth each, and Cumby paid Jones, Hollingsworth and Stedman, and all that was due John C. Robertson, some one hundred and sixty dollars, a balance that was due on Robertson’s portion of the land. Now, appellants contend, that the judgment and sale in favor of Robertson conveyed the whole title to the land as against appellees, Phelps & Co. Robertson had only a one-fourth undivided interest in the land, hence his judgment and sale effected only a good conveyance of one fourth to appellants, and no more.

The decision of this court in the case of McDonough v. Cross is decisive of this question. (40 Tex., 251.)

George L. Hill, also for appellees.

ROBERTS, CHIEF JUSTICE.—The court charged the jury, in effect, that the defendants, holding under the sheriff’s deed, given upon the sale of the land, under the judgment against Cumby, in favor of Robertson, enforcing the vendor’s lien

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for the balance of the purchase-money adjudged to be due to Robertson from Cumby for said land, could derive a title to only one undivided fourth of said land, by virtue of said sale; and that the undivided three fourths of the land would be subject to the appellee's mortgage, if the proof of its existence was satisfactory.

The verdict and judgment were rendered in accordance with this charge. Defendants assign this charge as error, committed to their prejudice.

The facts, mainly, on which this charge is based, are, that Messrs. Stedman, Jones, Hollingsworth, and Robertson, being the owners in common of two adjacent tracts of land, sold them to Cumby, gave to him a joint bond for title upon his paying them fifteen hundred dollars, secured by his note executed to them for that amount; that Cumby, having paid all of the money due on said note, except \$165.30, which was due to Robertson on his part of the note, he, Cumby, on the 1st of October, 1860, executed to said Robertson his note for said amount, the other parties having then been paid in full their respective shares thereof. Afterwards, Cumby executed his mortgage upon said land in favor of Phelps & Co., to secure their debt against him, on the 29th of October, 1866, which was duly recorded; that afterwards, to wit, on the 9th of April, 1869, Robertson brought suit against Cumby, on the said note, and obtained a judgment for the same, with a decree for the foreclosure of his vendor's lien upon the land, under which judgment the land was sold and purchased by Mrs. Adriana E. Spivey, under whom the defendants, who have appealed in this case, hold by deeds of purchase and by possession. Phelps & Co. were not made parties in the suit of Robertson v. Cumby

Supposing these facts to have been established to the satisfaction of the jury, did they authorize such a charge, as the correct rule, in adjusting the respective rights of the parties? We think not. As between Robertson and Cumby, the whole of the land was subject to the payment of the pur-

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chase-money until the last dollar was paid. There was no question as to the lien, which attached to this note, as between Robertson and his former joint owners in the land, for they had been paid, and there were no rights, legal or equitable, to be settled in that suit between them. Cumby could not, and did not set up any claim that the lien did not extend to and cover the whole of the land, for the payment of the last dollar of the purchase-money, by reason of his having paid the other joint owners. Nor could Phelps & Co. have done so, if they had been made parties to the suit, as they should have been. They, in the assertion of their claim, if they had been made parties to that suit, should have paid off, or tendered payment of, the amount of the prior lien, in the event of it being established, or at least procured an adjustment of the extent and priority of the respective liens, in the judgment of the court, upon the final determination of the suit. The purchaser, under Robertson's sale, acquired the legal title, if Cumby had it, to the whole of the land. And Phelps & Co., if their mortgage was a valid and subsisting lien, had an equity in the whole of the land.

In support of this charge of the court, we are referred to the case of *McDonough v. Cross*, (40 Tex., 251,) which is not at all in point applicable to this case. That was a very complicated case, in its facts, wherein a number of parties claimed liens upon the same land, and one of them sought, by superior diligence in the prosecution of a suit, to foreclose his lien, and by purchase of the whole land, under the judgment of foreclosure, to appropriate to his lien the whole fund, to the exclusion of the rest, under circumstances which this court deemed contrary to equity and good conscience. That is the principle of the decision. The facts were, that an executor, not subject to the County Court, as a means of dividing the land between devisees, sold it, giving a bond for title, and took notes to the respective devisees, according to their interests respectively in the land sold, which they accepted. One of them sued the purchaser, bought in the land, under

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his judgment, the other lien creditors, not being joined in the suit brought by him, brought suit to recover the land, and the others intervened. There were other matters complicating the case. In the opinion, it is said: "Under such circumstances, the lien for the payment of the notes, whatever may be its character, must be regarded as a security in favor of each of them to the extent of their respective interest in the land." Again: "All of the creditors, (having such liens,) unless the peculiar facts excuse a departure from the rule, are necessary parties to a suit to enforce the lien." And again: "Certainly, one of the creditors cannot, merely by a suit in his own behalf, seize upon and appropriate to his own benefit the entire security or trust fund." Thus it will be seen, that was a controversy between lien holders, each endeavoring to obtain a share of the common fund, to which they had an equal right, through similar and cotemporaneous liens, and which common fund one of them was seeking to exclusively appropriate. In that case, the purchaser from the executor bought the land again, when it was sold under a judgment, rendered against the executor, for a debt due by the testator. This court held, that the purchaser acquired no absolute title to the land by this last purchase, as the executor had substantially given over the beneficiary interest in the land to the devisees, before the judgment was rendered, and before the sale under it, but, as he had paid a debt, for which the whole of the land stood bound, in preference to the rights of the devisees holding the notes, he should be subrogated to the rights of the judgment creditor, and that, upon a resale of the land, his claim should be first paid. The same principle was announced in the case of *Harrison v. Oberthier*, 40 Tex., 385.

So in the case now under consideration: the defendants, as against the lien of Phelps & Co., held an interest in the whole of the land, by virtue of the sale under Robertson's judgment and foreclosure of his vendor's lien, and not to the one fourth or any other fractional part of the land. If Phelps & Co.

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had on record a valid subsisting mortgage upon the land at the time of the institution of Robertson's suit so as that he had actual or constructive notice of it, and they were not joined in the suit, they are not precluded from asserting their lien as against those who hold under said judgment and sale, but in doing so they must satisfy the defendant's interest thus derived in the whole of the land, and not in a part of it only. It has been decided by this court, that in such a case the purchaser at such a sale, under such circumstances, does not acquire an absolute title to the land, as against a subsequent incumbrancer. (*Byler v. Johnson*, 45 Tex., 509; *Preston v. Breedlove*, 45 Tex., 47.)

This charge of the court, complained of by the defendants, and assigned as error by them, so as to require it to be passed on, may have produced a result not really prejudicial to them. That depends upon facts not developed in this case in such way as to be the subject of consideration by this court—such as the value of the land, and the respective amounts each may be entitled to out of the common fund.

We are of opinion that the charge is erroneous, and sufficient ground for the reversal of the judgment.

The assignment of error, as to the estoppel of plaintiffs, by their alleging that their mortgage was worthless in the suit instituted by them against attorneys for alleged negligence in the examination of the title of Cumby to the land, is not tenable.

It was not a representation addressed to defendants, or to any one else, to induce any action upon it in reference to the land. It can hardly be presumed to have been so intended, or that any one could have supposed it to have been so intended. (*Bigelow on Estoppels*, 480; *Burleson v. Burleson*, 28 Tex., 416.)

As to the error assigned in the exclusion of the deed from Cumby to James, it may be remarked, that in this suit plaintiffs did not seek to recover the possession, or directly a title to the land, which is the class of cases in which we find that

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an outstanding title in another may be shown in defense of one in possession. No case has been cited of its applicability as a defense to a suit for the enforcement of a mortgage lien.

The other questions in the case may not arise upon another trial.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

W. B. COOK v. J. W. ROSS ET AL.

1. **RULE FOR COSTS.**—The letter of the statute (Paschal's Dig., 1500,) authorizes the dismissal of the case when a rule has been regularly entered requiring the plaintiff to give security for costs, if the security is not given on or before the first day of the next term after the rule. By a liberal construction of the statute, it is held that the rule may be complied with after the first day, if done before the case is dismissed.
2. **SAME.**—It is not error, for which, on appeal, a reversal will be had, to refuse to postpone a case when reached, in which a rule for costs has been entered, for the purpose of enabling the plaintiff to comply with the rule, or to overrule a motion to reinstate such case after the order of dismissal.
3. **SAME.**—If plaintiff and his leading counsel were both sick and unable to attend to business when the case was called, that fact, if presented at the time, might be a reason for postponing the case, and allowing further time for complying with the rule.

APPEAL from Panola. Tried below before the Hon. A. J. Booty.

Drury Field, for appellant, cited *Cook v. Beasley*, 1 Tex., 591; *Union Bank of Mississippi v. Hudgeons*, 3 Tex., 9; *Holshousen v. Hollinsworth*, 32 Tex., 86.

H. McKay, for appellees.

MOORE, ASSOCIATE JUSTICE.—If appellant has a meritori-

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ous cause of action, this judgment may no doubt work him an irreparable injury. But the rules and principles of law cannot be varied to meet the supposed equities of every particular case, nor the plain and positive requirements of the statute regulating its procedure be annulled or set aside by the court to relieve parties from the consequences of their carelessness and neglect. Experience in the administration of justice between litigants, from "the time whereof the memory of man runneth not to the contrary," demonstrates that cases will be more certainly decided in accordance with their real merits, and in conformity with the true principles of law and equity applicable to them, by an observance of the rules derived from the common law, and prescribed by the statutes, than for the court to determine them according merely to its opinion of their real merits or its view of morality and justice.

The petition in this case was filed on the 16th of October, 1875. On the 11th of February, 1876, the court being then in session, on motion of J. W. Ross, one of the defendants, the plaintiff was ruled to give security for costs, and, as is shown by the minutes of the court, the case was continued until the next term, under this rule. On the call of the case at the following term, on the 7th of August, 1876, the defendants moved its dismissal for the failure of the plaintiff to comply with the rule, whereupon the plaintiff asked for time to give the security. The court, however, refused to postpone the trial of the cause for this purpose, but stated to counsel that the security might be then given. And on his request, the court allowed the attorney for plaintiff to go upon the bond. The clerk, however, declined to accept a bond without other security than said attorney; and no bond being given, or other reason for a postponement or continuance of the case suggested, the court sustained defendant's motion, and dismissed the case.

The letter of the statute authorizes the dismissal of the case, when a rule has been regularly entered requiring the plain-

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tiff to give security for costs, if the security is not given on or before the first day of the next term after the rule. (Paschal's Dig., art. 1500.) By a liberal construction of the statute, it is held that the rule may be complied with after the first day of the term, if it is done before the case is dismissed. (Rhodes v. Phillips, 2 Tex., 164.) But there is certainly no warrant to say that the court should continue the case, when reached on the call of the docket, upon the assurance of counsel that, if additional time is given, the rule will be complied with, which, it seems from the statement of facts, was the only objection urged by plaintiff at that time to the action of the court on the motion to dismiss. And it can with as little propriety be said that the refusal of the court to set aside its judgment dismissing the case for failure to comply with its rule on tender of a sufficient cost-bond, is error, for which the judgment should be reversed.

In the amended motion to set aside the judgment and reinstate the cause, it is said the reason the security for costs was not given when the case was called for trial, was, that both plaintiff and his leading counsel were sick and unable to attend to business when the case was called and when it was dismissed. If counsel who were representing plaintiff had requested the court to postpone its action on defendant's motion for this reason, and the court had refused the application, plaintiff might possibly have had cause to complain; but no objection of this kind was made to the court's acting on the motion. This reason for plaintiff's failure to comply with the rule was suggested to the court for the first time in the amended motion to set aside the judgment dismissing the cause, and is based merely upon the information and belief of the attorney making it; and the statement of facts shows that no effort whatever was made on the hearing of the motion to establish the truth of this averment.

The judgment is affirmed.

AFFIRMED.

Argument for the appellees.

LUCINDA SIMMONS ET AL. v. J. F. BLANCHARD ET AL.

1. LAND CERTIFICATES—ADMINISTRATORS' SALE—LAND.—A colonist, with his wife, settled in Mercer's colony, in 1847, soon after which both died. The husband's estate was alone administered on, and a colony certificate for 640 acres was issued in the name of the husband, and sold by the administrator: *Held*, That if legally sold, in due course of administration, such certificate being community property, the sale passed the legal title to it, and to any land on which it might be located, from the heirs of both the colonist and his wife.
2. LAND CERTIFICATE—ADMINISTRATORS' SALE—LAND.—Such a certificate was sold, under order of the County Court, by the administrator, on the estate of the deceased colonist in 1851, and the money paid by the purchaser; there was no formal confirmation of sale, but the same was reported by the administrator to the court, in an exhibit showing the condition of the estate, two years after which the court ordered the administrator to make title to the purchaser to a part of the land afterwards covered by the certificate, which had been patented to the heirs of the colonist. Appellees claimed the land under the original purchaser at administrators' sale: *Held*, That these facts, in connection with other undisputed mesne conveyances to appellees, constituted a right in them to the land as against the heirs of the colonist's wife.

APPEAL from Vanzandt. Tried below before the Hon. M. H. Bonner.

Robertson & Herndon, for appellants.

J. J. Hill, for appellees.—It is not deemed necessary to refer to authorities in maintenance of the proposition that an order in probate cannot be impeached in a collateral proceeding on account of irregularities. The proposition which I meet and attempt to confute is that such an order can be impeached in a collateral proceeding on account of fraud. I maintain the negative of this proposition, and refer to the following authorities to show that a judgment or order in probate can never be impeached in a collateral proceeding on account of fraud by the heirs, because, the proceeding

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being *in rem*, the heirs are parties to it, and, being parties to it, they must institute some direct proceeding. (Freem. on Judg., chaps. 8 and 13, secs. 132, 334-336; Grigon's Lessee v. Astor, 2 How., 338; United States v. Arredondo, 6 Pet., 709; Beauregard v. New Orleans, 18 How., 502; Sheldon v. Newton, 3 O., 494; Thompson v. Tolmie, 2 Pet., 157; Iverson v. Loberg, 26 Ill., 179; Green v. Green, 2 Gray, 361; Freem., secs. 335-337; Vase v. Morton, 4 Cush., 27; Leonard v. Bryant, 11 Met., 370; Freem., 486, 489, 491; Drinkard v. Ingram, 21 Tex., 650; Saltanstol v. Riley, 28 Ala.; 41 Ala., 26; Paschal's Dig., 1314; George v. Watson, 19 Tex., 369; Withers v. Patterson, 27 Tex., 491; Alexander v. Maverick, 18 Tex., 179; Gen. Laws 1870, p. 196; Constitution of 1869, art. V, sec. 7; Id. 1845, art. IV, secs. 10 and 15; Paschal's Dig., 480, 1382, 1384; Lott v. Ballaud, 21 Tex., 170; Hagerly v. Scott, 10 Tex., 530; McCown v. Foster, 33 Tex., 241; Soye v. Maverick, 18 Tex., 100; Soye v. McCallister, 18 Tex., 80.)

ROBERTS, CHIEF JUSTICE.—This is a suit to establish a right to one undivided half of three hundred and twenty acres of land, patented to the heirs of Ezra W. Wiley, by appellants, as the heirs of his wife, Margaret J. Wiley, by a former husband, against John F. Blanchard, in possession, who claims title to the land under a claim of title from the administrator of said Ezra W. Wiley, who sold the certificate of Ezra W. Wiley, which had been obtained in his name as a colonist of Mercer's colony, and which certificate had been located on the land by one of the intermediate purchasers thereof.

The alleged defect in the title of Blanchard is in a defective sale of the certificate by the administrators of the estate.

Wiley and wife having emigrated to and settled in Vanzandt county, a part of Mercer's colony, in 1847, both died near the same time, the wife first, and a colony certificate for six hundred and forty acres of land having been issued in his name, fell into the hands of the administrators of his estate—his

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wife's estate never having been administered upon, otherwise than in the administration of his estate.

The certificate being community property, if it was legally sold by the administrator in the due course of administration of his estate, under these circumstances, for the payment of community debts, such sale passed the title in the certificate, and in any land upon which it might be located, from the heirs of both John W. and Margaret J. Wiley. (*Soye v. Maverick*, 18 Tex., 100; *Soye v. McCallister*, 18 Tex., 80.)

It was alleged and proved, that Blanchard, and those under whom he held title, had settled upon and improved the land for twenty years before the suit was brought; had paid a full consideration for the land, and had no actual notice of the claim of appellants to said land as heirs of their mother, Margaret J. Wiley.

As to the defect in the sale of the certificate, it was shown that a sale of it, with other certificates, was ordered by the County Court, upon the application of the administrators—one six hundred and forty and one three hundred and twenty—to be sold for cash; that a transfer of the certificate was made by the administrators to Andrew J. Hunter, reciting purchase by him at said sale, for the sum of forty-six dollars, dated on the 18th day of February, 1851; that there was no confirmation of said sale formally made by said County Court, but, instead thereof, it was shown that the administrators afterwards, on the 27th of October, 1851, submitted to said court "an exhibit of the condition of the estate of E. W. Wiley," which was approved by said court, in which, amongst many other debits and credits, an entry is found as follows:

"Sales for cash:

"One 640-acre land certificate	-	-	-	-	\$44.00
"One 320-acre land certificate	-	-	-	-	29.50

"Total	-	-	-	-	-	-	-	\$73.50"
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In addition to this, it was shown that upon an application made to the County Court by Willis Steele, representing that

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he had purchased one half of said certificate, and had it located and patented, the court, on the 27th of February, 1854, ordered the administrators to make to said Steele a deed to said land, which was done by one of the administrators. It was shown by the evidence of A. J. Hunter that he had bought the certificate at the administrators' sale and paid the administrators for it, and took a transfer from them for the same. These several orders of the court were admitted in evidence. The transfers of the certificate from Hunter down to Steele were in evidence, and the transfers of the land from Steele down to Blanchard were admitted to be regular and perfect.

Upon the trial, the court, after enumerating and specifying the various orders of court, transfers, and deeds in the chain of defendant's title to the land in controversy, charged the jury that they were sufficient to vest a title to the land in the defendant Blanchard; and further, that if Blanchard, or any one of those under whom he held, had purchased the said land for a valuable consideration paid therefor, without notice of the claim of appellants, he, Blanchard, had a good title as against them.

These charges of the court, we must presume, proceeded upon the idea that the appellants, being heirs of the wife, had only an equitable interest in the certificate, and in the land upon which it was located and patented to the heirs of Ezra W. Wiley, the said interest not being apparent either upon the face of the certificate or upon the face of the patent; and that the certificate having been sold by an order of court for a valuable consideration paid to the administrators of the estate of Ezra W. Wiley's estate, passed to the purchaser an equitable title thereto, (although the sale was not formally confirmed,) superior to the equities of appellants.

We are not prepared to say that this was an erroneous view of the case as presented in the record.

The appellant's counsel have filed no briefs, and that of the counsel for appellees, though exhaustive, relates mainly

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to the conclusive force of the order of the County Court, when collaterally attacked.

It is to be noticed in this case that the certificate issued in the name of Ezra W. Wiley, and the patent was issued to the heirs of Ezra W. Wiley. In reference to the patent, the legal estate in the land is in the heirs of Ezra W. Wiley. If their interest in it had not been divested, they would still hold the legal title—it may be, in trust for the appellants—to the extent of the share of the half interest, inherited through their mother, subject to whatever equities may have attached to the heirs of Ezra W. Wiley by their expense of location, occupation taxes, and improvements upon the land. The appellants hold no better position, as against appellee, who claims the title of the heirs of Ezra W. Wiley, as represented in the patent through a *bona fide* though informal sale of the certificate by the administrators of his estate.

There was not a formal confirmation of the sale made by the County Court upon a report of the sale of the certificate by the administrators. There was shown in evidence an order of court for the sale of this certificate, identified by name and number of acres, as well as others, and the order required two certificates to be sold for cash—one for 640, and one for 320 acres. The order was made on the 27th day of January, 1851; also a transfer, dated 18th of February, 1851, from the administrators to A. J. Hunter, of said certificate, reciting that it had been sold by order of court for forty-six dollars, paid to them by Hunter; also an exhibit of the administrators, filed and approved on the 27th of October, 1851, showing that a certificate for 640 acres and for 320 acres had been sold for cash; and also an order of court on the 27th of February, 1854, directing the administrators to make Steele a deed to 320 acres of land, upon which a part of this certificate had been located and patented upon his representation that he had become the owner of that much of the certificate by transfers from Hunter down to him. This was sufficient evidence that the sale had been made, and that it

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had been called to the attention of the court, inferentially by the exhibit, and certainly and directly by the application of Steele, three years after the sale, and that the court did not disaffirm the sale, but affirmed it, as far as this informal mode could have that effect. From these proceedings it was fair to presume, in the absence of contrary evidence, that the sale had been made for a legitimate purpose, the proceeds of which had gone to the benefit of the estate, and that its legality and fairness had been recognized by the court by an order made in favor of Steele, when its attention had been afterwards directly called to the sale.

This constituted a *prima facie* equitable right to the certificate in the hands of Steele, to whom it had been transferred, if not a perfect title. There being no evidence to rebut the fair presumption arising upon these facts, all of which were established by written instruments and records, it was not error in the court to charge the jury that these, in connection with other undisputed muniments of title, constituted a right in the defendant to the land as against the heirs of the wife, who were plaintiffs in the suit. That was the effect of the charge.

The charge did not embrace the conclusion that the sale of the certificate was such as to invest a perfect legal title. A regularly legal title to property sold at an administrator's sale can only be passed from the estate by confirmation of the sale upon a report of it by the administrator in conformity to the statute. (Paschal's Dig., art. 1327; *Littlefield v. Tinsley*, 26 Tex., 357; *Davis v. Stewart*, 4 Tex., 223; *Bradbury v. Reed*, 23 Tex., 260.)

In the decisions wherein this is held, it is virtually conceded that an equitable right may be acquired by a sale without a formal confirmation. In the case of *Neill v. Cody*, it is said: "A confirmation of the sale, or something from which a confirmation might be inferred, or at least, something done by the purchaser giving him the right to have the sale confirmed, must have been shown, to enable him to claim title. (26 Tex., 290.)

Syllabus.

It *prima facie* appears, as before indicated, that Hunter bought and paid for the certificate at a sale ordered by the court, and the court at least recognized that he had done so, without a disaffirmance of the sale; and that would have been a sufficient ground for his asking a confirmation of the sale.

This being decisive of the case, we do not feel called upon, without briefs or discussion of other points, to refer to them.

Judgment affirmed.

AFFIRMED.

Justice Moore did not sit in this case.

F. M. HAYS v. THE HOUSTON G. N. R. R. Co.

1. PRACTICE—AMENDMENT.—After both parties to a suit have announced ready for trial, and exceptions to the petition have been overruled, it is in the discretion of the court whether the plaintiff will be permitted to amend, and again give a full statement of his cause of action—such amendment not having been rendered necessary by the ruling of the court.
2. DAMAGES, MEASURE OF.—In a suit against a railroad company for the alleged wrongful act of its conductor in ejecting plaintiff from a passenger car, the jury was in effect charged, that in considering the actual damage sustained by plaintiff, they would estimate the same by the injuries sustained by the plaintiff in his feelings, his person, and his estate; that they might look to plaintiff's situation in life, his reputation in the community, and any circumstances which might appear from the evidence to have attended the act complained of, but they could not take into account the wealth of defendant or the poverty of the plaintiff: *Held*, That there was no error.
3. CORPORATION—EXEMPLARY DAMAGE.—A corporation, as well as an individual, may be guilty of such "willful act, omission, or gross neglect," as to subject it to exemplary damages, but no more than individuals are they responsible for the malicious acts of their agents. No distinction can be made as to liability for damages inflicted by an agent, whether the master be a natural or an artificial person.
4. CORPORATION—DAMAGES FOR ACTS OF AGENTS.—The actual dam-

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ages to which a railroad company must respond, extending as it does to injuries to the feelings, and damage for personal suffering, gives to juries sufficient scope, without allowing exemplary damages, except in cases when the corporation has itself been remiss.

5. **EXEMPLARY DAMAGES AGAINST RAILROAD COMPANY, WHEN ALLOWED.**—If the malicious act of its agent is ratified and adopted by a railroad company; if there is carelessness in the selection of employees, or in the establishment of appropriate regulations; if, in short, the corporation or other officers by whom it is controlled and represented are guilty of some “fraud, malice, gross negligence or oppression,”—the law will hold the company liable to exemplary damages, but not otherwise.

APPEAL from Smith. Tried below before the Hon. M. H. Bonner.

Suit by Hays against the Houston and Great Northern Railroad Company, to recover damages, claimed by him to be fifty thousand dollars, because of his alleged wrongful expulsion by a railroad conductor from one of the passenger trains of said company, on the 7th day of July, 1873, between Zavalla and the city of Tyler. Appellee denied the allegations of said petition, and pleaded legal justification for the act of his agent. Trial was had, and the jury, after being charged by the court, returned a verdict against the company and in favor of Hays, for one hundred dollars, actual damages, besides costs of suits, &c.; from which judgment Hays took this appeal.

On the 7th July, 1873, Hays was at Troup, and wished to go to Tyler, accompanied by his wife, five children, a nurse, and a lady friend of his family. The testimony shows (except that of Hays) that the regular fare between these points was one dollar for each person over twelve years old, fifty cents for each one between five and twelve, and no charge for children under five. The testimony of Mrs. Hays shows that five of the number were over twelve years, three between five and twelve, and one under five. On the morning of the 7th of July, Hays, with his family and friend, repaired to the depot, where they were invited into the ticket office—Hays

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was acquainted with the ticket agent—and then went to the ticket window and called for tickets. Mr. Ferris (the man in the office) inquired, “for all the crowd?” Hays says, “yes;” and began to enumerate them; but before he had finished, Ferris was called away. When he returned, Hays told him he had always paid four dollars for his family from there to Tyler, but there was then an additional person with his family. Ferris said he would only charge the same, when Hays told him, he “wished to pay full fare.” Ferris said, “that is sufficient; you shall go through for that.” Hays then handed him five dollars, and received five tickets, and with his family and friend entered the car and took their seats. Soon after starting, the conductor came through the car, as usual, collecting tickets, when Hays handed him five tickets. The conductor took them; and hesitating a moment, said to him, “You will have to pay another fare.” Hays told him he had bought his tickets of the agent at Troup, and that he said they were sufficient. Conductor told him it was the agent’s business to sell tickets, but the conductor’s to collect the money; he “would have to pay another fare, or get off at Hill’s station.” The conductor then walked off, and shortly afterwards the train stopped at a wood pile. While there, he again approached appellant, and told him he had come for the other fare; and in reply to Hays’s response, “you have?” the conductor told him, yes; and he must pay it, or one of them must be put off. To this Hays replied, “We will see about that.” After the train started again, the conductor came to him the third time for the other fare, and asked him if he would pay it, when Hays replied, “no;” and the conductor put him off.

As to the manner of appellant’s ejection, there is a conflict of testimony: the plaintiff, his wife, and lady friend testifying that he was pushed against a seat on the opposite side of the aisle, after being raised from his seat by the conductor, while the conductor and engineer say he was taken out by the conductor alone, and put off while the train was

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still—the conductor holding his hand until he stepped on the ground—and that no more force was used than was necessary; and these are corroborated by the mail agent, who was on the train, and a passenger, who was sitting close by and witnessed the transaction. Appellant admitted that he made pretty stout resistance to being put off the train.

The injuries complained of were a bruise on the right thigh and one on the left hip, caused by his catching hold of the iron railing, and the tearing of his breeches. No witness testified to those injuries except himself and wife.

The testimony further shows that Ferris, the person from whom Hays purchased the tickets, was not the ticket agent, and had no authority from the railroad company to sell tickets. He was local freight agent at Troup, but on that morning had been requested by the ticket agent, Parks, to sell tickets for him. Parks was the ticket agent, but had no authority from the company to empower another to sell for him, and this was the only instance in which he had done so. Ferris paid over the money he received from Hays to Parks, but told him of no arrangement he had made with Hays, and Parks forwarded the money to the treasurer of the company, but with no report of the arrangement which Hays says he made with Ferris. The testimony further showed that ticket agents had no authority to pass persons over the road, except at regular fare; and that it was the duty of conductors to put all off the train who had neither tickets or pass, and who refused to pay their regular fare.

Jones & Henry, for appellant.—Corporations are liable to vindictive damages for the willful and malicious acts of their servants. (*Passenger R. R. Co. v. Young*, 8 Am. R., 79, 80; *Bryant v. Rich*, *Ib.*, 451, note 456; *Higgins v. W. T. & R. Co.*, 7 Am. R., 293; *Jackson v. 2d Av. R. R. Co.*, 7 Am. R., 448.)

And the court so charged, but made the right of the plaintiff to recover them depend upon the payment of his fare—

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meaning full fare—or on his right to ride free; and charged that, if he was willfully and maliciously ejected at a place which was not a usual stopping place, he would be entitled to recover actual damages only, unless plaintiff had paid full fare or had a right to ride free.

This charge was erroneous, and no doubt controlled the amount of the verdict.

R. B. Hubbard, for appellee.—We admit that a conductor or servant of a corporation could only use such necessary force as would be required to effect the expulsion of a passenger, when such passenger was wrongfully on board, not having paid his fare. The question of exemplary or punitive damages, however, can never arise in any case, even when unnecessary force is used in expelling a passenger, provided the passenger is wrongfully on board. In such case, the jury can only consider the amount of actual damages sustained by the party expelled. (*Coleman v. N. Y. and N. H. R. R. Co.*, 106 Mass., 160; also 19 Ohio, 157; 53 N. Y., 25; 19 Mich., 205; 47 N. Y., 274; *Sandford v. Eighth Avenue R. R. Co.*, 23 N. Y., 343; 7 Bosw., 122; *Great Western R. R. Co. v. Miller*, 19 Mich., 305; *Barker v. N. Y. Central R. R. Co.*, 24 N. Y., 599; 22 Barb., 130; *Northern R. R. Co. v. Page*, 33 How. Pr., 327; 26 and 38 Mo.; 37 Cal.; 53 N. Y.; 56 N. Y.; 19 Mich.; 11 Mich., 447.)

Stephen Reaves and *Baker & Botts*, also for appellee.

GOULD, ASSOCIATE JUSTICE.—Appellant brought this suit to recover damages for personal injuries received, and the violation of his rights as a passenger, in the alleged malicious, forcible, and wrongful act of defendant, by its agent, the conductor, in ejecting him from the cars. He claimed that he was rightfully on the cars; that the act of the conductor in expelling him was wrongful, was accomplished in a rude and insulting manner, and by personal violence, resulting in injuries to his clothing and bruises to his person, and was

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further aggravated by being done in the presence of, and to the great terror of plaintiff's wife and children, and by putting him off in the woods, and not at a usual stopping place. In an amended petition, he alleged that the defendant not only authorized the conductor to commit the grievances complained of, but did, after the commission thereof, ratify, confirm, justify, and adopt said acts.

Exceptions were taken and sustained to so much of the petition as set up the distress of the plaintiff's wife and children, because of his expulsion, and their belief at the time that he was seriously hurt. In addition to the general denial, there was a special answer, alleging that the plaintiff, with his wife, five children, a lady companion, and a servant, entered the cars, on the tacit condition that he would pay, when demanded, the usual rates of fare, of which public notice had been given, and of which he knew, amounting to six dollars, (or tickets;) that when the fare was properly demanded, he presented only five tickets, and refused to pay the additional fare due, asserting that he would pay no more, and that neither he nor any of his company would get off, unless put off by force; and that after repeated demands, the conductor, with the use of no more force than was necessary, and without any malice or oppression, laid hands on him and conducted him off the cars at a usual stopping place. The result of the trial was a verdict and judgment for the plaintiff for \$100, actual damages.

The plaintiff moved for a new trial, on the ground that the damages allowed were too small; that the verdict should have been for exemplary damages; that the court erred in refusing instructions asked, and in the charge as given, and in giving in part a verbal preliminary charge, and also in the admission and exclusion of evidence. His motion being overruled, the plaintiff has brought the case here by appeal.

Evidently, the only questions that need be considered are those bearing on the amount of damages, and as it has not been argued here that this court should reverse the case, on the

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ground simply that the jury should have allowed larger or vindictive damages, it is only necessary to inquire whether the court committed any error affecting the amount of plaintiff's recovery.

There are nineteen assignments of error, but it is believed that the questions involved are really but few, and may be discussed and disposed of without attempting to follow their assignments. It appears by bill of exceptions, that after the parties had announced themselves ready for trial, and the court proceeded to pass upon defendant's exceptions to the petition, and had overruled the same, except in the particular already stated, that the plaintiff tendered an amended petition, in which he again gave a full statement of his cause of action. The court refused to receive it, because offered too late. It is sufficient to say that it was within the discretion of the court whether it would permit an amendment not rendered necessary by its rulings at that stage of the trial, and that it does not appear that that discretion was abused. But the action of the court, even if erroneous, did not affect the plaintiff injuriously. His pleadings were sufficient to allow evidence of every fact material to the full presentation of his case. The only evidence offered by him and excluded was, as to whether the conductor, when he called for the fare, had on his hat the badge required by the statute. It is not perceived how that fact could, if proved, have increased the amount of damages. For the same reason, it is not material to inquire whether the court erred in its instructions on the subject of what was a usual stopping place, nor, indeed, whether there was any error in the charge, submitting that to the jury as a question of fact, unless it was such as might have misled the jury as to the amount of their verdict. By that verdict, they find that the act of expulsion was wrongful, and they further find what were the actual damages to plaintiff from that wrongful act. So much of the charge as bears only on the right of the plaintiff to be on the cars, and the right of the conductor to eject him, need not

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be reviewed. No specific error is pointed out in the assignments of error, or otherwise, in the instructions, as to what might be considered in estimating actual damages. The jury are told to estimate the actual damages by the "injuries sustained by the plaintiff in his person, his estate, and his feelings," and are told that they may look to the plaintiff's "situation in life, his reputation in the community, and any circumstances which may appear from the proof to have attended the (acts) complained of," but not to take into account "the wealth of the defendant or the poverty of the plaintiff." We think that the subject of the amount of actual damages was fairly placed before the jury.

On the subject of exemplary damages, the jury are told, "that in cases of malice, or a wanton disregard of the rights of others, in violation of law, the jury may, in such cases, in addition to actual damages, go further, and, in the exercise of a sound discretion, assess such further damages as they may deem just as a punishment for this malicious intent, or this wanton disregard of the rights of others, and this, with regard to corporations as well as individuals."

The right of the plaintiff to recover exemplary damages, however, is made to depend on the question of whether he was rightfully on the train or not.

That view of the law is stated repeatedly; but the following extract from the charge will suffice to present the views of the presiding judge: "It is a rule of law, that a party seeking legal redress, must show his adversary in the wrong, and must show himself in the right, and that no negligence of his own has tended to increase or consummate the injury. But if the plaintiff was rightfully on the train, by payment of fare, or right to ride free, conferred by proper authority, and the conductor was actuated by a wicked intent to do the plaintiff an injury, or did the act in a spirit of wanton disregard of the plaintiff, and with the use of insulting words, then the jury will be warranted in assessing exemplary damages; other-

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wise, in such cases, they will confine themselves to an estimate of the actual damages sustained by the plaintiff."

As we are of the opinion that, under the evidence, the case was not one in which exemplary damages could have been allowed, it does not become necessary to inquire into the correctness of this charge.

In expressing this opinion, we do not mean to say whether, if the conductor himself had been defendant, he might or might not have been so punished. The evidence, as to the nature of his acts, was, to some extent, conflicting, and it is not necessary to pass upon it. What we mean to say is, that there is no evidence that the railroad company was guilty of any such "fraud, malice, gross negligence, or oppression" as to subject it, in addition to actual damages, to exemplary damages, by way of punishment.

That exemplary damages are in the nature of punishment, has long been the recognized doctrine in this State. (*Graham v. Roder*, 5 Tex., 149.)

Unless a party has been guilty of some "fraud, malice, gross negligence, or oppression," he is not subject to this punishment.

That a corporation, as well as an individual, may be guilty of such "willful act, or omission, or gross neglect," as to subject it to exemplary damages, is, in this State, settled beyond question. (Const. of 1869, art. XII, sec. 30; Const. of 1875, art. XVI, sec. 26.)

Corporations, as well as individuals, may deserve punishment. But no more than individuals, are they to be punished for the malicious acts of their agents. "It is obvious that no distinction can be made as to this liability, whether the master be a natural or an artificial person." (*Hamilton v. Third Ave. R. R. Co.*, 53 N. Y., 29; *Phila., W. & B. R. R. Co. v. Quigley*, 21 How., 202.)

Unquestionably, the master, whether an individual or a corporation, is liable to the extent of actual damages for the willful trespass of his servant committed in the course of his

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employment, even if done against his orders. The rule "is founded on public policy and convenience." "In every such case, the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity in all matters within the scope of the agency." (Story on Agency, sec. 452.)

For excessive violence or other wrong committed by the conductor in ejecting a person from the cars, both the conductor and the company are responsible. But in the language of Justice Campbell, in delivering the opinion of the Supreme Court of Michigan, in a case similar to this, for damages for being ejected from the train, "It does not follow that the responsibility of his employers is the same as his, (the conductor's.) For those aggravations which may arise out of his wantonness and malice, we have held that the employer is not on the same footing as the agent." (Great Western R. W. Co. v. Miller, 19 Mich., 305.) The court refers to the case of *Detroit Daily Post Co. v. McArthur*, 16 Mich., 447, which was an action for libel against a publishing corporation. In that case, the court say, "There is no doubt of the duty of every publisher to see at all hazards that no libel appears in his paper. Every publisher is therefore liable, not only for the estimated damages, and such special damages as may appear, but also for such damages on account of injured feeling, as must unavoidably be imposed from such a libel published in a paper of such a position and circulation. But no further damages than these should be given, if he has taken such precautions as he reasonably could to prevent such an abuse of his columns. When it appears that the mischief has been done in spite of precautions, he ought to have all the allowance in his favor which such carefulness would justify, in mitigation of that portion of the damages which is awarded on account of injured feelings. The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the habitual enforcement of such rules as would probably exclude improper items, would reduce

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the blameworthiness of a publisher to a minimum for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling, beyond what is inevitable from the nature of the libel. And no amount of express malice in his employees should aggravate damages against him when he has thus purged himself from active blame. If, on the other hand, it should appear from the frequent recurrence of similar libels, or from other proof tending to show a want of solicitude for the proper conduct of his paper, that the publisher was reckless of consequences, then he would be liable to increased damages, simply because by his own fault he had deserved them." (16 Mich., 454, 455.)

As we have just seen, the principles here laid down are applied to the expulsion of a party by the conductor from the cars. The opinion has been cited at length, as stating what is believed to be the true doctrine. The distinction taken, as to the extent of the liability of the principal and agent, or employer or employee, is established by other authorities. (The Amiable Nancy, 3 Wheat., 546; Kirksey v. Jones, 7 Md., 622; R. R. Co. v. Finney, 10 Wis., 388.)

In the case of Turner v. North Beach and M. R. W. Co., 34 Cal., 600, which was a suit for damages against the company for expulsion from the cars, the court says: "If her expulsion resulted from the malice of the conductor, or was accompanied by violence and personal indignity, the conductor alone is responsible for such damages as she may be entitled to for this cause, beyond the actual damage resulting from her expulsion from the car, unless, as before stated, the company expressly or tacitly participated in the malice and violent conduct of the conductor."

Justice Story says: "If this were a suit against the original wrongdoers, it might be proper to go yet further, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of

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the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in case of loss. They are innocent of the demerit of this transaction, having neither directed it nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants; but they are not bound to the extent of vindictive damages." (3 Wheat.)

It is believed that there is no principle which would attach to a railroad company a greater liability for the acts of the conductor than to the owners of a vessel, for the act of the master.

We are aware that cases are to be found which assert that the liability of the railroad is the same in extent as that of its employee. (*Atlantic & Great Western Railway Co. v. Dunn*, 19 Ohio, N. S., 162; *Goddard v. Grand Trunk Railway*, as reported in *Redf. Am. R. W. Cases*, vol. 2, 502, and cases cited in those opinions.)

In the case from Ohio, the court say, in regard to the question: "We find no settled or decidedly preponderant course of decision upon it. The cases are irreconcilably conflicting; and the only aid we can derive from them is through the suggestions of legal principles which they contain." The question is certainly not yet settled by authority, and we have been unable to concur in the reasoning, which means, as we think, that the courts have authority, on considerations of public policy, to introduce a new rule as to the extent of the liability of railroad or other corporations for the acts of their employees, differing from the rule recognized in other cases of principal and agent, or employer and employee. If such a modification of the law is desirable, it is our opinion that it should be authorized by legislation.

In fact, however, the actual damages to which the com-

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pany must respond, extending as it does to injuries to the feelings, and danger of personal suffering, seems to give to juries sufficient scope, without allowing exemplary damages, except in cases where the corporation has itself been remiss. If the malicious act of its agent is ratified or adopted; if there is carelessness in the selection of employees or in the establishment of appropriate regulations; if, in short, the corporation, or their officers by whom it is controlled and represented, are guilty of some "fraud, malice, gross negligence, or oppression,"—the settled rules of law will hold it liable to exemplary damages, but, in our opinion, not otherwise.

In the case before us, the evidence clearly shows that the plaintiff had not paid his full fare, and that the conductor had authority, and under the rules of the company was required, to eject him. If the jury believed that the conductor used excessive force, or that he put the plaintiff off maliciously, at an improper place, there is nothing whatever to show that the malice of the conductor can be rightfully imputed to the company. There was no averment that the company had been remiss in the selection of a conductor, or in its instructions for his government; nor was there any evidence justifying exemplary damages against the company.

The judgment is therefore affirmed.

AFFIRMED.

Chief Justice ROBERTS did not sit in this case.

FINCHER JONES v. BURGETT & HICKOCK.

1. **AMENDMENT—NEW CAUSE OF ACTION.**—An amendment correcting the description of a call made for the beginning corner of the field-notes of a tract of land sued for, and which amendment is but a better description of the same tract of land claimed in the original petition, is not a new suit.
2. **SAME—LIMITATION.**—In such case, limitation is stopped by the filing of the original petition, as against the defendant.

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3. **SURVEY—EVIDENCE OF SURVEY.**—Where it is shown that a tract of land sued for forms part of a block of surveys, the outer corners of the surveys in the block being known and identified, and from adjacent surveys the position of the land sued for is thus ascertained and fixed, such evidence of identity of the land sued for is sufficient, though no lines or corners can be found of the survey in controversy.
4. **SAME—CALLS.**—Where from actual corners, lines not marked are run by course and distance, and a stream is found where called for, but of a different name from that called for in the field-notes, it may be inferred that the call for the stream was a mistake, and to that extent course and distance would be regarded, instead of the call for a stream elsewhere made in the field-notes.
5. **SAME.—CHARGE.**—See case where judge, after instructing the jury to regard calls, 1st, natural objects; 2d, artificial marks; and 3d, course and distance, “that neither of these should absolutely control the others when that other most truly indicates to the minds of the jury the proper locality of the tract.”
6. **SAME.**—There is no rule of law which makes a call for a natural object, under all circumstances, the controlling call, so as to preclude the consideration of other evidence as to the true locality of the land.
7. **SAME.**—The fact that lines of a survey were not actually run, will not invalidate a patent, provided the land can be identified with reasonable certainty; and where lines were not run, a mistake in a call for a river might occur, which, if made in a survey actually run, would be difficult to explain.
8. **SAME.**—That a surveyor adopted field-notes of a former survey, which were incorrect, however evidencing dereliction of duty in the surveyor, would not affect the validity of a patent upon such defective survey.

APPEAL from Kaufman. Tried below before the Hon. M. H. Bonner.

October 23, 1856, Julia Burgett, as administratrix of estate of Sidney A. Sweet, joined by her husband, sued, in trespass to try title, Fincher Jones and others, for land described as follows in the petition: “One league and one labor of land granted by the State of Texas to John C. Brooke, assignee of James S. Ramsey, on the 3d day of July, 1847, then in Nacogdoches land district, in the waters of Bois d’Arc, fork of the Trinity river—beginning at the east corner of league

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and labor survey No. 38, of King's block, a stake, &c.," (giving field-notes of a square of 5,099 varas to each side.)

May 24, 1859, plaintiffs amended, alleging "that the field-notes and patent of league No. 38 calls for the lines crossing the east fork (or Bois d'Arc fork) of the Trinity river, whereas, in fact, the actual survey made upon the ground did not cross the east (or Bois d'Arc) fork, but the same is a mistake; and where said field-notes and patent call for crossing the east (or Bois d'Arc) fork of the Trinity, Musquiet creek was intended; they therefore allege that the calls in said patent to league No. 38 for the east (or Bois d'Arc) fork was in fact a mistake, and the said Musquiet was mistaken for the east fork, and so miscalled in said field-notes and patent; and the said league No. 38 of King's block being so located on Musquiet Creek, and not on the east fork of the Trinity aforesaid, and the league No. 40, beginning at the east corner of league No. 38, and the said defendants being on said league No. 40 herein sued for, they pray," &c.

May 24, 1859, defendants plead not guilty.

May, 1866, death of plaintiff was suggested, and William Burgett and H. H. Hickock allowed to become plaintiffs, showing that they were entitled to sue.

February, 1867, plaintiffs further amended, alleging that "the league and labor of land sued for, to wit, No. 40 in King's block of leagues, is one of a large number of surveys, partly in Dallas and partly in Kaufman county, known in the General Land Office, on the maps of said office, by reputation and public notoriety as "King's Block;" that said block contains a large number of leagues of land, forming a system of surveys known and designated on the maps in the public archives of the State;—in the maps in the county surveyor's office of both the counties of Kaufman and Dallas, by the numbers of said surveys and leagues in said block;—in the field-notes and patents of the respective leagues, as designated by the numbers aforesaid; and they further say, that said league and labor No. 40 occupies its appropriate place on

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said maps, and its appropriate place upon the ground where actually surveyed; and the adjacent leagues thereto are known and designated by numbers aforesaid, and by marks, corners, and lines as called for in their field-notes respectively; that league No. 38 is well defined, by the calls in the patent to the same, by marks, lines, corners, and courses and distances from the same, and appears on the ground where actually surveyed; and the east corner thereof is ascertained and constitutes the west corner of league and labor No. 40 aforesaid, as sued for, &c.

The defendant excepted to the amended petition, as setting up a new and distinct cause of action, and that the land described was not that originally sued for, &c. To the amended petition they pleaded not guilty, and statutes of limitations of three, five, and ten years.

Fincher Jones was, on the final trial, the sole defendant—suit as to the others having been dismissed or abated by death. Parties intervened, but they were not before the court on this appeal.

The court, after stating the case and charging upon the title as offered by plaintiffs, further instructed the jury:

“You will next proceed to consider of the other proposition, that the plaintiffs must prove reasonably to your satisfaction that the land in controversy is the same as that embraced in the patent. Lands are usually identified by the field-notes of the same, when surveyed, also by adjacent and surrounding surveys or other artificial calls, or by natural objects, when called for in the field-notes, and are sufficiently identified. These notes and the calls therein should be sufficiently certain in description to identify the land from other surveys and from the mass of the public domain.

“The patent in this case purports to convey the land mentioned therein by certain mentioned bounds. Where these metes and bounds, are is a question of fact to be determined by the jury; and as the identity of the land is the principal question of controversy in this suit, I give you the following

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as the rules of law laid down for your guidance in such cases:

“The main object of inquiry is, to ascertain the true location of the land as described in the field-notes, and the calls as therein set out in the patent under which plaintiffs claim. The patent having issued, the presumption arises that the land was actually surveyed, according to the field-notes, until the contrary is proven.

“If any of the calls therein are for perishable objects, as for bearing trees, and these cannot be found, the presumption will arise that they have been destroyed or defaced, rather than that they never existed; and if no survey has in fact ever been made, yet, if the calls in the patent for other surveys, and for natural and artificial objects, are such that thereby the land conveyed by the patent can be found and identified by other surveys surrounding the same, this, in law, is a sufficient description.

“When the lines of a survey have been actually run upon the ground, and the corners established and the lines and bearing-trees marked, these, if they can be found, constitute the true boundaries of the land; and if they, or a sufficient number of them, are shown by evidence so as to establish to the satisfaction of the jury the true location of the land, these must be respected by the jury, and must not be departed from or made to yield to course and distance or any other less certain matter of description.

“Where the testimony fails to establish to the satisfaction of the jury the locality of the land described in the field-notes, by lines actually run and marked, or by established corners appearing on the ground, or by evidence of enough of these to reasonably identify the land to the satisfaction of the jury, then you should see if you can so identify the same by evidence in regard to other calls, if any, made in the field-notes. These other calls, as a general rule, are embraced under one or more of the following three classes:

“1st. The first, and usually most important, as controlling

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the others, are natural objects, such as mountains, rivers, ravines, creeks, lakes, prairies, or other fixed and immovable objects, which are generally notoriously known, or which can be easily ascertained and identified.

“2d. The second, and usually next most important and controlling, are artificial marks, such as made by man, in contradistinction to natural objects; and in surveys, to designate the work of the surveyor—as mounds, rocks, posts, stakes set in the ground to mark corners, chops, hacks, blazes, crosses, letters, &c., upon line and bearing trees.

“3d. Usually, the least important of calls are those for course and distance, which are the direction of the lines of the survey, with regard to the cardinal points of the compass, and the length of the same as called for in the field-notes.

“As a general rule, these three classes are important in the order in which they are named, as 1st, 2d, and 3d; but neither of these should absolutely control the other, when that other most truly indicates, from the testimony, to the mind of the jury, the proper locality of the land in the particular case.”

Verdict and judgment for the plaintiffs. Motion for new trial was overruled, and Jones appealed.

T. J. Word, for appellant, carefully discussed the facts, citing and discussing *Ayers v. Cayce*, 10 Tex., 99; *Urquhart v. Burleson*, 6 Tex., 502; *Stafford v. King*, 30 Tex., 273; *Hubert v. Bartlett*, 9 Tex., 104.

R. F. Slaughter, also for appellant.

J. C. Robertson, for appellees.

GOULD, ASSOCIATE JUSTICE.—This suit was commenced, October 23, 1856, to recover “one league and labor of land, granted by the State of Texas to John C. Brooke, assignee of James S. Ramsey, on the 3d day of July 1847, then in

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Nacogdoches land district, on the waters of the Bois d'Arc fork of the Trinity river, beginning at the east corner of league and labor survey No. 38 of King's block, a stake for first corner," setting out the field-notes, showing the survey to be a square. By an amended petition, filed May 24, 1859, it was alleged that the field-notes of league No. 38, by mistake, call for lines crossing the east fork, or Bois d'Arc fork, of the Trinity river, instead of Mesquite creek. In a subsequent amendment, it is alleged, that King's block contains a large number of leagues of land, forming a system of surveys, known in the land office and on the public maps, the respective surveys being designated by numbers in regular succession; and the league and labor sued for is further described as No. 40, in this block, and is alleged to occupy its appropriate place on the public maps, and upon the ground where actually surveyed; that the adjacent leagues are known by their marks, corners, and lines, and that league No. 38 is well defined by lines, corners, and courses, the east corner thereof—the beginning corner of league No. 40—being ascertained.

The defendant claimed a portion of the land sued for, relying mainly on the ten years' statute of limitation, and on the failure of plaintiffs to identify the land claimed.

There was a verdict and judgment for plaintiffs, from which defendant has appealed.

The evidence as to whether defendant's possession commenced in 1846 or 1847 is conflicting, and certainly is not such as would justify us in disturbing the verdict of the jury.

It is claimed that the amendment, alleging the mistake in the field-notes of No. 38, amounted to a new suit, and that the running of the statute did not stop until this amendment was filed. The statement which has been made of the pleadings is sufficient to show that the original and amended petitions claim the same land, and that the position taken by appellants cannot be sustained.

On the trial it appeared that no marked lines or corners of

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league 40 could be found. There was evidence of a general correspondence in the character of the country called for in the field-notes and found at the respective corners of the land claimed. For example: the beginning corner is placed in a small prairie, as called for, and the course and distance then place the other corners in prairie or in timber, also as called for. The second corner was sought to be established by a lone tree, called for in the field-notes, and by the fact that in surveys made for defendant and others at different times after 1851, that corner of the league is called for and treated as known.

The plaintiffs also sought, and we think successfully, to show that the outer corners of a number of the adjacent leagues were identified, and that from these adjacent surveys the position of the league sued for was ascertained and fixed. This may often be the only method of establishing the location of a survey in a region consisting, as in this case, largely of prairie land. Competent surveyors testified, that by this method they could find any of the leagues in the block, including the league sued for. The evidence disclosed that the field-notes of league No. 38 called for the east fork of the Trinity; whereas, if the east corner of league 38 and beginning corner of league 40 is where it was claimed to be by plaintiff, the east fork is several miles to the eastward, and would in fact be crossed by two of the lines of league 40, though the field-notes of league 40 contain no calls for the river.

On the part of appellants, it is contended that the calls for such a natural object as a river control all other calls; that the lines of No. 38 must be extended so as to reach the river called for, and that consequently the east corner of 38 and beginning corner of No. 40 must be fixed so far to the eastward of the point claimed by plaintiffs as to leave defendant on land not within the bounds of league 40. The plaintiffs introduced evidence of the locality of the south and west corners of league No. 38, and then by measurement the correct

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distance called for fixed the beginning corner. The evidence was, that Mesquite creek was found where the east fork was called for, but that the difference in the streams was so great that no surveyor would mistake one for the other. The court instructed the jury in regard to calls for: 1st, natural objects; 2d, artificial marks; and, 3d, course and distance; "that neither of these should absolutely control the other, when that other most truly indicates from the testimony to the mind of the jury the proper locality of the land." Under the evidence, we think the charge given was correct and appropriate. There is no rule of law which makes a call for a natural object, under all circumstances, the controlling call, so as to preclude the consideration of other evidence as to the true locality of the land. (*Booth v. Upshur*, 26 Tex., 64; *Booth v. Strippleman*, 26 Tex., 436.)

King's block, consisting of one hundred and fifteen leagues, joining, or at least purporting to join, a solid block of squares with common corners, was surveyed by a company of three surveyors in 1840, Terrell and Casey being two of the company. Many of the certificates proving fraudulent, the surveys became vacant. The survey of league 40, on which it was patented, purports to have been made by Terrell, in 1844. The identity of the field-notes with those of the survey in 1840 and the evidence of Terrell, make it probable that he simply adopted the field-notes of Casey, who purports to have made the original survey. The evidence makes it quite probable that in surveying King's block, all the lines were not run. There is no positive evidence on the subject, but circumstantial evidence points strongly to the conclusion that only some of the lines were actually run out. If such were the fact, it would not invalidate the patent, provided the land can be identified with reasonable certainty. (*Staford v. King*, 30 Tex., 273, and cases there cited.) And, if such were the fact, it is evident that a mistake in a call for a river might occur, when, if the survey were actually made, it would be more difficult to explain. The evidence in this

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case is amply sufficient to support the verdict of the jury, establishing, that there was a mistake in the field-notes of league No. 38, and that the beginning corner of league 40 was where it was claimed to be by plaintiffs.

It is claimed that there was error in excluding the evidence of Lacy, a chain carrier, who was with Terrell in making surveys in that region in 1844, to the effect that this league and labor was not then surveyed by him. It is not material to inquire whether this evidence was correctly excluded, as contradicting the recorded survey, on which Lacy's name did not appear as a chain carrier. If it had been established that Terrell made no survey at that time, or at any other, but simply adopted the field-notes of a former surveyor, this might show, if Terrell did not know that the field-notes adopted were correct, that he was derelict in his duty, but could not affect the validity of the patent. Nor do we think that the averments of the plaintiffs were such as to require them to prove that there was an actual survey.

The evidence in the case is voluminous, and it has not been attempted in this opinion to even allude to any other than such parts of it as were necessary to show the points decided.

The intervenor did not appeal, and we have not therefore considered errors assigned by him.

There is no error in the judgment, and it is accordingly affirmed.

AFFIRMED.

ROBERT BELCHER v. THOMAS M. WEAVER.

1. **MARRIED WOMEN—AUTHENTICATION—SEPARATE ACKNOWLEDGMENT.**—The certificate of an officer to the privy examination of a married woman who, with her husband, signs a deed, which certificate recites that the wife acknowledged in her privy examination that she signed the deed "without any bribe, threat, or compulsion" from

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her husband, is sufficient, if good in other respects. The words used are construed as equivalent to a declaration by the wife that she signed the deed freely and willingly, and negative the exercise of any improper influence or duress by the husband.

2. **SAME—MISTAKE.**—The unintentional use of one word for another by an officer in his certificate of the acknowledgment by a married woman to a deed will not affect the certificate, where the mistake obviously appears from an examination of the entire instrument.
3. **SAME.**—There must be a substantial, though there need not to be a literal, compliance with the terms of the statute; and although words not in the statute are used in the place of others that are, or words in the statute are omitted, yet, if the meaning of the words used is the same, or they represent the same fact, or if the omission of a word or words is immaterial, or can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be held sufficient.
4. **APPROVED:** *Monroe v. Arledge*, 23 Tex., 473.

APPEAL from Smith. Tried below before the Hon. M. H. Bonner.

Robertsons & Herndon, for appellant.

Jones & Henry, for appellee, cited, in support of their position that the certificate was sufficient, *Monroe v. Arledge*, 23 Tex., 480; *Berry v. Donley*, 26 Tex., 745; *Tubbs v. Gatewood*, 26 Ark., 128.

ROBERTS, CHIEF JUSTICE.—The only question in the case, as stated by counsel on both sides, is, did the District Court err in admitting in evidence the deed of a married woman, to which was attached the following certificate:

“THE STATE OF TEXAS, }
County of Smith. }

“Personally appeared before me, Samuel D. Gibbs, Chief Justice of Smith county, Woody Belcher, party to a deed bearing date November the 29th, 1858, and acknowledged that he, the said Belcher, signed the said deed, for the purposes and considerations therein set forth and expressed, and Ellen Belcher, wife of said Belcher, also a party to said deed,

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whose signature, with her mark to the same, being by me, said Gibbs, examined privately and apart from that of her husband, and having the said deed fully explained to her, she, said Ellen Belcher, acknowledged that she signed the said deed without any bribe, threat, or compulsion from that of her husband, and that she does not wish to contract the same. Given under my hand and seal of the County Court of Smith county, at Tyler, this the 29th day of November, 1858.

“SAMUEL D. GIBBS,
“*Chief Justice, Smith Co.*”

The form of the certificate prescribed by the statute is as follows, so far as it relates to the wife:

“Personally appeared ———, wife of ———, parties to a certain deed or writing, bearing date on the ——— day of ———, and hereto annexed, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said ———, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.”

The statute provides that any certificate showing that the requisites of the law have been complied with, shall be as valid as the form here prescribed. The enacting clause, does not use exactly the same terms as those used in the form prescribed. It is, that the wife, “being privily examined by such officer, apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed or writing so again shown to her to be her act; thereupon such judge or notary shall certify such privy examination, acknowledgment, and declaration under his hand and seal,” &c.

The word “freely” may be omitted in the certificate, because it is omitted in the form. The word “seal” may be omitted, because when this deed was made a seal was not

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necessary. The words "and deed," in connection with "act," may be omitted, because, though in the form, it is not in the same connection in the enacting clause. So the word "delivered" is in one and not in the other. The form does not include that the deed was "shown to her," as contained in the enacting clause of the law.

The substance of what must be stated in the certificate is nominally, at least, divided by the statute into three parts—the privy examination, the acknowledgment, and the declaration. This division, when we come to apply the law in fact, will be found more nominal than real, because the statute does not itself make a perspicuous and distinctive division in specifying the things necessary to be done.

The certificate of the officer should show substantially that the things required by the statute had been done. This might be shown in a certificate, wherein each part is not separately presented, but even rather confusedly intermixed, if, upon a consideration of the whole certificate, it could be seen that they had been done. In other words, what is stated in the certificate is intended as a representation on paper of what was done in the discharge of this duty imposed upon the officer by the law; and although the representation may blend the parts in one, or use language, in making the representation, not technically appropriate, still, if the expressions used in making the representation, as the officer evidently meant them to be used and understood, clearly represent the several things to have been done which the law requires, it will be a sufficient certificate. The form, as given in the statute, is strikingly variant from the enacting clause in the terms used to represent what should be done, as has been shown by a comparison of the two; and if we should examine the words and expressions used in the form and in the enacting clause of the law to arrive at the meaning of the Legislature as to what they intended should be done, certainly, with equal propriety, we should examine the words and expressions of the officer, to arrive at his meaning, however in-

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artificially expressed, in his effort to represent on paper what he had done.

The expressions representing the privy examination are complete, excepting some bad grammar. The declaration that she signed the deed without any bribe, threat, or compulsion from her husband may be regarded as tantamount to her having signed it freely and willingly. Her freedom of action, and willingness to make the deed, has reference to, and is designed to negative any improper influence or duress by the husband. She may regret to part with her property, or she may think the price inadequate, or she may be loath to change her residence, and be unwilling to execute the deed for such purposes, in one sense, while she, from considerations controlling her will, other than any constraint from her husband, may wish earnestly, or even anxiously, to execute the deed. Is it her will, or is she made the unwilling instrument of the husband's will, to execute the deed, is the controlling question under the law. By the word "bribe," the officer most probably meant undue influence, improper inducement, or allurement by the husband, and, in connection with the words "threats or compulsion," sufficiently indicate that she acted freely and willingly, in the execution of the deed, in reference to any improper influence or constraint from her husband.

In the case of *Meriam v. Harsen*, (2 Barb. Ch. Rep., 232,) Chancellor Walworth presented and acted on this construction of the statute of New York; and the Supreme Court of that State, in following it, say, that "if the wife executes without fear or compulsion, she manifestly does it freely, and the object of the statute is fully secured." (*Dennis v. Tarpenny*, 20 Barb. Sup. Ct. R., 376.)

The word "contract," used in the certificate, was evidently used by mistake, in writing it, for the word "retract," as used in the statute. In a case in this court, where a certificate was defective, by leaving out the word "seal," in what should have been the expression, "Given under my hand and seal

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of office," it was held, that the omission was evidently accidental, and could be supplied by a construction of the whole instrument. (*Nichols v. Stewart*, 15 Tex., 235.) The mistake, in this instance, in the unintentional use of one word for another, is equally obvious, as the omission was in that case.

The general rule upon this subject is, that there must be a substantial, though not a literal, compliance with the terms of the statute, and that, although words not in the statute are used in the place of others that are, or words in the statute are omitted, yet, if the meaning of the words used is the same, or they represent the same fact, or, if the omission of a word or words is immaterial, or can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be held sufficient. (*Monroe v. Arledge*, 23 Tex., 478; *Dennis v. Tarpenny*, 20 Barb. Sup. Ct. R., 376; *Owen v. Norris*, 5 Blackf., (Ind.) 479; 6 Ib., 476; *Pardon v. Dobesberger*, 3 Port., (Ind.) 389; *Gregory's Heirs v. Ford*, 5 B. Monr., 481; *Langhorne v. Hobson*, 4 Leigh, (Va.) 242.)

There may occasionally be found cases, in which there has been, in following this rule, a very strict construction of the words used. (*Bogkin v. Rain*, 28 Ala., N. S., 332; *Ala. L. I. Co. v. Bogkin*, 38 Ala. N. S. Rep., 510.)

It is contemplated by the enacting clause of the statute that after the deed has been fully explained to her, and she has declared that she signed it freely and willingly, she should then acknowledge the deed to be her act. This may be designed as a means of impressing upon her that she has not made it her deed, by having it signed previously, but that she is now doing that which makes it her deed, by acknowledging it to be her act.

In this certificate, what is termed the declaration and the acknowledgment are blended together by the expression that "she, Ellen Belcher, acknowledged that she signed the said deed, without any bribe, threat, or compulsion from her husband," &c. If we examine the whole instrument, we will

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find that the officer, in taking the acknowledgment of the husband, Woody Belcher, used the expression, "the said Belcher signed the said deed." He used the word "signed" instead of the word "executed" which is used in the statute. (Paschal's Dig., art. 5007.) He doubtless did not know the difference in the two words, but regarded them as meaning the same thing, and therefore used the word "signed" in the sense, as he understood it, of "executed." So, too, when he said that the wife acknowledged that she signed the deed and wished not to retract it, he understood himself as conveying the meaning that she acknowledged that she executed the deed. To say that a person signed a deed, would be understood generally by those not versed in legal phraseology as being the same as, that he executed a deed.

In addition to this, the law itself is not entirely free from confusion, not only from the important differences in the language of the enacting clause and the form prescribed, as has been shown, but also, in making nominal divisions in the parts of this transaction, without any well-defined designation of the parts of it consistently adhered to in the enacting clause, and in the form. For, if what is pointed out in the privy examination, and in the declaration, has been fully performed, it might be difficult to perceive that all had not been done which was necessary to include also a substantial acknowledgment of the deed as being her act.

It follows, then, that any artificial distinctions being made for the purpose of showing that one of the nominal parts are not specifically embraced, or that one part is defectively stated, will not avail, if from the evident sense of the whole instrument a reasonable conclusion can be arrived at, that the requisites of the law have been complied with.

We are of opinion that the certificate, though very informal, was sufficient, and that the court did not err in admitting it in evidence.

AFFIRMED.

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ELIJAH M. BELL ET AL. v. F. C. VANZANT ET AL.

1. **LAND—EVIDENCE.**—A conveyance from H. to V. of land, described the beginning corner, and then proceeded to direct how the lines were to be run from this point, so as to include 767 acres, but did not purport to be a conveyance of land actually surveyed or marked out: *Held*, That in a suit for the land by those claiming through this deed, the plaintiff, to entitle him to recover all the land, must show that the field-notes set out in his petition and relied on by him, commenced at the place designated in said deed.
2. **LAND—SURVEY—CHARGE OF COURT.**—By the evidence in the trial below, it was a question open to controversy as to whether the survey relied on by plaintiff commenced at the point designated in the deed from H. to V., and in this state of the evidence the court charged as follows: "Before the plaintiff can recover under this branch of the case, he must satisfy you that the land embraced in the deed from H. to V. is the same land, or some portion of the same land described in the petition." * * And again: "In ascertaining whether the land conveyed by H. to V. is the same land described in the petition, the jury should look to all the facts and circumstances detailed in the evidence. All that is required of the plaintiff is to show with reasonable certainty that the land conveyed by H. to V. is the same land, or some portion of the same land, sued for and described in the petition:" *Held*, That, unexplained and unqualified, this charge, taken literally, entitled the plaintiff to recover all, on his showing title to any part of the land sued for, and was erroneous.

APPEAL from Harrison. The district judge, having been of counsel, declined to try the cause, and the same was tried before James Turner, esq., special judge, selected by the parties.

The facts are sufficiently stated in the opinion of the court.

H. L. Hightower, for appellants.

G. B. Lipscomb and *F. B. Sexton*, for appellees.

GOULD, ASSOCIATE JUSTICE.—This suit was instituted in 1852, by the executrix of the will of Isaac Vanzant, deceased, to recover of Samuel L. Young seven hundred and sixty-

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seven acres of land, a part of B. F. Hooper's headright league, described by metes and bounds. In 1871, Elijah M. Bell, the appellant, was made a party defendant by supplemental petition. Young, the original defendant, died years before, during the pendency of the suit, and Bell claimed a part of the land sued for, some of it under conveyance from Young's heirs, and some under other persons, claimed to have been in possession when the suit was brought, but who were not made parties. As to the remainder of the land sued for, Bell filed a disclaimer; and as to that part which he claimed, set up the defense of ten years' limitation.

On the trial, the plaintiffs (the heirs of Vanzant having in the progress of the case become parties) produced in evidence a patent to Hooper, and a deed from Hooper to Isaac Vanzant, dated August 29, 1842, conveying seven hundred and sixty-seven acres of the league, described as "commencing at a post oak tree, marked with the letter V on the south side, about one fourth of a mile southeast of Young's field or improvements, and to include said improvement, and west of the Lockagee branch, about one hundred steps." The deed proceeds to direct how the lines are to be run from this point so as to include seven hundred and sixty-seven acres, but does not purport to be a conveyance of land actually surveyed or marked out. Plaintiffs also proved by a surveyor that he found, in 1874, a survey on the Hooper league marked on the ground, with lines corresponding to the directions given in the deed from Hooper, and containing seven hundred and sixty-seven acres, but whether this survey actually commenced at the point called for in that deed was, under the evidence, a question open to controversy. On the part of appellant, it is contended that there was no evidence whatever to establish that the survey commenced at the point called for, but that in fact the evidence established that point to be at quite a different place.

If the true beginning point was where it was claimed by appellant to be, then a considerable part of the land claimed

by appellant was not in fact embraced in the bounds of the land to which plaintiffs showed title.

In this state of the evidence, the court instructed the jury, that if the plaintiffs showed a grant to Hooper, embracing the land sued for, and a conveyance of that land to their ancestor, they should find for the plaintiffs, unless, under instructions thereafter given, they found for defendants. The charge then proceeds: "Before the plaintiffs can recover under this branch of the case, they must satisfy you that the land embraced in the deed from Hooper to Vanzant is the same land, or some portion of the same land, described in the petition." * * * And again: "In ascertaining whether the land conveyed by Hooper to Vanzant is the same land described in the petition, the jury should look to all the facts and circumstances detailed in the evidence. All that is required of the plaintiffs is, to show with reasonable certainty that the land conveyed by Hooper to Vanzant is the same land, or some portion of the same land sued for and described in the petition." In a subsequent part of the charge, in connection with the defense of limitations, the jury are told that they may find for plaintiffs a part of the land sued for, but there is nothing to qualify or explain the part of the charge which we have cited.

It will be observed that this charge, taken literally, entitles the plaintiff to recover, on his showing title to any part of the land sued for. If we were at liberty to supply what we presume the presiding judge intended to add, that the recovery of plaintiffs would be only for so much of the land claimed as was shown to be embraced in the deed, the charge would be unobjectionable. The correctness of the charge must be tested by the fair construction of the language used; and we see nothing in the language which will justify us in saying that it meant, or that the jury understood it as meaning, to authorize a verdict for plaintiffs for that part only of the land which the evidence showed to be embraced in the deed.

It was for the plaintiffs to show title; and in order to do so,

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to all of the land claimed, it was important for them to show that their field-notes commenced at the place designated in the deed.

By their verdict, the jury found for plaintiffs the land sued for, except certain parts thereof, which excepted parts being those which were in possession of and claimed by other persons than Young when the suit was brought, they found for appellant, evidently on the ground of limitation, and not on the ground of plaintiff's failure to establish title. Indeed, most, if not all of the land so found for appellant was embraced in the deed from Hooper, whether the beginning point was where plaintiffs or appellant placed it.

This error in the charge is distinctly pointed out in the assignments of error; and, as we cannot say that it may not have led the jury to find for plaintiffs, without reference to the true locality of the land, we think it entitles appellant to a reversal of the cause.

The only other errors assigned relate to questions of fact, on which we refrain from expressing any opinion. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JAMES H. CANNON, ADM'R, v. McDANIEL & JACKSON.

1. **APPEAL—JURISDICTION.**—When, of several defendants in an action, one only appeals, the case will be considered on appeal only with regard to such matters as affect the rights of appellant.
2. **ADMINISTRATION—ESTATES OF DECEDENTS.**—Whilst it would be the better practice to present to an administrator, for allowance and approval, the mortgage, as well as the notes, against the estate, which it was executed to secure, yet the presentation and allowance by the administrator of the notes alone will be sufficient to authorize a suit to foreclose the mortgage.
3. **ADMINISTRATION—JUDGMENT—ESTATES OF DECEDENTS.**—The fact that an affidavit, proving up notes against an estate, for allowance and approval, was made by one not a party to them, nor rep-

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resenting himself in the affidavit to be an agent of the party, cannot be made available, except in a direct proceeding to set aside the approval. The allowance and approval, being in the nature of a judgment establishing the notes, cannot be attacked in a collateral proceeding. The same rule applies, after approval, when, in the certificate of authentication for allowance, the word "payments" has been left out.

4. **LIEN—PROMISSORY NOTE.**—The assignee of a note secured by lien, may enforce the lien, as well as the payee, for the lien is an incident that follows the note.
5. **JURISDICTION—COUNTY COURT.**—Under the act of March 20, 1848, regulating proceedings in the County Court, the owner of notes, secured by mortgage on the property of an estate, could enforce his lien in the County Court, and in no other court, unless there was some good ground for invoking the jurisdiction of the District Court.
6. **DISCUSSED.**—*Danzev v. Swinney*, 7 Tex., 626, discussed.
7. **SUBROGATION—JURISDICTION—LIEN.**—B purchased land from C, from whom he received a deed, and to whom he gave three notes, with D and E as sureties for the purchase-money, and executed a mortgage to secure the same; afterwards C assigned to X two of the notes only, and, in conjunction with his wife, guaranteed their payment; X held the notes so assigned for the use of Y, and, as his trustee, had the same allowed, after B's death, by his administrator, and approved by the County Court; afterwards, X, for the use of Y, recovered a judgment against D and E, the sureties, and C and his wife, as guarantors, having alleged the insolvency of B's estate. In entering the judgment, the clerk failed to show that it was for the use of Y. X failed to collect the judgment. In a suit afterwards brought by Y to correct the judgment, so as to show his interest, and as subrogated to the rights of C and wife, to recover judgment against B's administrator foreclosing the mortgage: *Held*,
 1. That B did not, by his purchase, acquire a legal title to the land, but it remained in C, who, as to the notes assigned by him, held it in trust for the benefit of Y.
 2. That as C had not only assigned two of the notes, but had guaranteed their payment, there being no other fund except the proceeds of the sale of the mortgaged land, Y was entitled to priority of payment over the note not assigned.
 3. That the case, as stated, presents equities which the County Court had no power to adjudicate.
 4. That Y, being subrogated to the rights of C, would not lose his claim upon the land, though the remedy on the notes had been lost.
 5. That the judgment in the suit by Y, to correct the judgment procured by X, should have been for the principal and interest

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due on the notes, subjecting the land to sale for its satisfaction, with an order directing its execution by the administrator in the administration of the estate.

8. PARTIES.—When different persons hold liens upon the same property, who are known, all should be made parties, if practicable, when the rights of any one of them are sought to be enforced by suit.
9. Where a note is secured by a mortgage, the lien is not lost by bringing suit first on the note without including the lien.

APPEAL from Anderson. Tried below before the Hon. John H. Reagan, special judge.

The facts necessary to a proper understanding of the opinion will be found contained in it.

T. T. Gammage, for appellants, contended—

1st. That if the lien existed at all, it could only be enforced in the County Court; and relied on *Robertson v. Paul*, 16 Tex., 472; *Wheeler v. Love*, 21 Tex., 584; 20 Tex., 129; *Graham v. Vining*, 1 Tex., 639; *Martin v. Harrison*, 2 Tex., 456; *Conkrite v. Hart*, 10 Tex., 141; *Bogges v. Lilly*, 18 Tex., 205; *Chandler v. Burdett*, 20 Tex., 44; *Cunningham v. Taylor*, 20 Tex., 129.

2. That this case having been once before this court, and the pleas of the jurisdiction of the District Court having been by it, on that occasion, adjudged good, (38 Tex. 491,) the question of jurisdiction is *stare decisis*, citing *Chambers v. Hodges*, 3 Tex., 517; *Wood v. Wheeler*, 9 Tex., 128; *Cooley's Const. Lim.*, 47-55; 1 Kent, 475.

3. That the allowance and approval of the notes were nulities; citing *Walters v. Prestidge*, 30 Tex., 73, 74.

4. That Mrs. Deckerd stood in the relation of an innocent purchaser without notice; citing *Baxter v. Dear*, 24 Tex., 17; *Stone v. Darnell*, 20 Tex., 11. He also cited, on other propositions to which the opinion refers, *Giddings v. Crosby*, 24 Tex., 299; *Conkrite v. Hart*, 10 Tex., 142; *De Cordova v. Smith*, 9 Tex., 129; *Luter v. Rose*, 20 Tex., 648; *Rogers v. Green*, 35 Tex., 730.

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T. J. Word, for appellees.—That the parties had a right to be subrogated, I refer to 1 Story's Eq. Juris., secs. 567, 635, 638; 2 Story's Eq., sec. 1226.

It is not pretended the land has ever been paid for. Mrs. Deckard has abandoned it; lives in Cherokee county. Two orders of the Probate Court, one 1866, and one 1869, have been made—the first allowing her \$600 in lieu of these 205 acres of land, and directing other lands in Trinity and Cherokee to be sold, to raise the \$600; the other, during the pendency of this suit, setting apart these 200 acres of land for a homestead.

The authorities relied on are *Crosby v. McWillie*, 11 Tex., 94–96, AUTHENTICATION; *Harrison v. Oberthier*, 40 Tex., 387, HOMESTEAD; 38 Tex., 487, 490, 491.

ROBERTS, CHIEF JUSTICE.—This is a second suit upon the notes, and a second judgment in the last suit—the first judgment having been reversed and remanded by the Supreme Court.

The first suit was brought in October, 1866, by R. M. Bonner, for the use of McDaniel and Jackson, against W. Y. Lacy and John G. Stuart, as sureties on the notes of John T. Deckard, then deceased, and against I. S. Taylor and wife, assignors and guarantors of said notes, in which a judgment was recovered against them, on the 5th of November, 1866, for \$2,497.40, being the principal and interest then due upon said two notes. In this judgment, it was recited that “R. M. Bonner, for the use,” &c., recovered the judgment, without mentioning the names of the usees, McDaniel and Jackson, in the judgment.

This suit was brought by the usees, McDaniel and Jackson, to correct the previous judgment, so as to have them to appear to be the beneficiaries in the recovery against the same parties, defendants, and also against James H. Cannon, as administrator of John T. Deckard, setting up a mortgage upon a tract of land, made by Deckard at the time of the

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execution of the notes to I. S. Taylor, to secure the payment of the notes, being the land for which the notes were given, then sold by Taylor to Deckard. Pending this suit, Harriet M. Deckard intervened, on behalf of herself, as widow, and of her two children, as heirs of John T. Deckard, claiming the land as a homestead, set apart to them as such by order of the County Court of Anderson county, in October, 1869, after the institution of this suit, and previous to her intervention. The plaintiffs recovered a judgment, in the name of Bonner, for their use, December 5, 1871, against I. S. Taylor, "*pro forma*," and against his wife, subrogating them to all the rights of said Taylor and wife in the said mortgage and in the said land, and that the same be sold in satisfaction of the said judgment. In said judgment it appeared that the suit was dismissed, as to Lacy, on account of his plea of bankruptcy; as to Stewart, not served with process; and as to I. S. Taylor, with respect to a judgment for money, on account of his bankruptcy, the judgment for the amount of money due was rendered against the wife of Taylor. From this judgment no appeal was taken by Taylor or his wife; but Cannon, administrator, and Mrs. Harriet M. Deckard appealed, and obtained a reversal of the judgment, on the 8th of September, 1873, by the Supreme Court.

After the return of the case to the District Court, the plaintiffs amended their pleadings, setting up their rights of subrogation under the judgment against Taylor and wife, which they had not appealed from, and represented the order of the court, setting apart the land as a homestead to Harriet M. Deckard and her children, to be a nullity, it being made after this suit was commenced, and a substituted allowance for a homestead, having been previously made, which had not been set aside.

The plaintiffs again, on the 28th of November, 1874, recovered a judgment, "that Harriet M. Deckard take nothing by her plea of intervention;" and against Cannon, adm'r, for \$2,497.40, the amount of the first judgment against Lacy

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and others, and ten per cent. interest thereon from its date, 5th of November, 1866; that the mortgage be foreclosed, and that execution issue to sell the land. From this judgment Cannon, the administrator, alone has appealed to this court.

All of the other parties, as sureties, assignors, and guarantors, and intervenor, represented separate and distinct interests in reference to the suit of plaintiffs, and their failure to appeal from the judgments, as to them, leaves them out of the case in its present consideration by this court. (*Cheatham v. Riddle*, 8 Tex., 162.)

Exceptions were taken to this suit by the administrator Cannon, because, although the notes had been allowed by the administrator and approved by the court, the mortgage was never presented to the administrator for allowance or rejection, nor was it alleged to have been, so as to authorize a suit upon it against the administrator in any court. In answer to that, it is contended that the mortgage is but an incident to the notes which it is given to secure, and that a presentation of it for allowance is unnecessary, if the notes are allowed and approved. It would certainly be the better practice to present the mortgage, or a copy of it, with the notes for allowance, so as to apprise the administrator and the court of its existence, especially where there was any considerable delay in proceedings to assert the lien consequent upon it. Chief Justice Hemphill advanced the opinion, though not as a conclusively authoritative decision, that it was sufficient to procure the allowance and approval of the notes secured by the mortgage, without the mortgage itself. He arrived at that conclusion by a construction of the words of the statute: "Any creditor of the estate of a deceased person, holding a claim secured by a mortgage or other lien, which claim has been allowed and approved, or established by suit," may obtain an order of sale, &c. (*Paschal's Dig.*, art. 1319.)

Danzy v. Swinney, 7 Tex., 627. This was followed in the decision of a case subsequently. (*Simpson v. Reily*, 31 Tex., 301.)

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This is certainly the literal interpretation of the statute, and without some more cogent reason than any that now presents itself, it would hardly be proper to depart from it.

An objection was made to the affidavit proving up the notes for allowance and approval, by a person not a party to them, nor representing himself in the affidavit to be an agent of the party. The allowance and approval being in the nature of a judgment, establishing the notes as a valid claim against the estate, precludes the consideration of that question now, otherwise than by a direct proceeding to set aside the approval.

For some reason, the objection is not available to the defect in the certificate of authentication in leaving out the word "payments." In a case where the word "credits" was left out, it was held that the authentication was sufficient; and the claim being rejected, suit should have been brought on it in three months, as required by the statute, (*Crosby v. McWillie*, 11 Tex., 94.)

But in a suit upon an account, authenticated by an affidavit, which omitted the words "payments and offsets," it was held that a suit could not be maintained on the account so proved up. This was in a direct proceeding, wherein the sufficiency of the affidavit was a material fact in support of the suit upon the account. (*Walters v. Prestidge*, 30 Tex., 65.)

Both of these questions are settled in this case, by the allowance and approval of the claim. (*Moore v. Hillebrant*, 14 Tex., 312, and references therein.)

The assignee of a note secured by a lien, may enforce the lien, as well as the payee; because the lien is an incident that follows the note. (*Moore v. Raymond*, 15 Tex., 554; *Murray v. Able*, 19 Tex., 213; *Id.*, 500; *Pinchain v. Collard*, 13 Tex., 335, 336; *Duty v. Graham*, 12 Tex., 427; *Perkins v. Sterne*, 23 Tex., 561.)

The administrator, Cannon, by exceptions and by a plea, objected to the jurisdiction of the District Court, as not competent to render a judgment and foreclose the mortgage lien

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in this case. The District Court overruled the exception, and held the plea to the jurisdiction insufficient to defeat the plaintiff's action against him, which is assigned as error by appellant. That plaintiff, being the assignee of two notes secured by a mortgage, can proceed to enforce his lien in the County Court, is well established by numerous decisions of this court; and that he must do so, unless there is some good ground for bringing the suit in the District Court, is equally well established, by a continuous line of decisions from the case of *Robertson v. Paul*, (16 Tex., 472,) down to the present time. (*Fortson v. Caldwell*, 17 Tex., 628; *Cunningham v. Taylor*, 20 Tex., 128; *Wheeler v. Love*, 21 Tex., 584; *Perkins v. Sterne*, 23 Tex., 561; *Emmons v. Williams*, 28 Tex., 778.)

The case of *Danzey v. Swinney*, (7 Tex., 626,) which is sometimes cited for a contrary doctrine, does not decide the contrary; but in the opinion upon another matter, by way of argument or illustration, it is stated that such a rejected claim of lien may be prosecuted in the District Court to judgment, execution, and sale by the sheriff; whereas the point decided was, that a claim not presented to the administrator for allowance, could not be prosecuted to enforce a lien in the County Court.

The act authorizing suits to enforce liens against estates in the District Court, as found in the District Court act, was passed before the act of 1848, authorizing such a suit to be instituted in the County Court when the claim has been allowed and approved, which is found in the act concerning the estate of deceased persons. (*Paschal's Dig.*, art. 1319, 1479.)

That such is the established rule, and that it has been most rigidly enforced in favor of the jurisdiction of the County Court, is fully shown by reference to the cases that have been just cited, as well as to others that might be referred to.

There are cases, however, in which the jurisdiction of the District Court has been maintained in suits relating to estates of deceased persons, on account of some legal or equitable

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right of the party, for the adjudication of which the powers of the County Court were inadequate.

Where a creditor sought to reclaim for an estate a large amount of property, alleged to have been fraudulently conveyed by the intestate before his death, it was decided that the suit was properly brought in the District Court, and the administrator was properly made a party to the suit to receive the property, and have it adjudged to him in the event of a recovery. (*Hall v. McCormick*, 7 Tex., 278, 279.)

An heir brought and maintained a suit for a distribution of an estate being administered upon, on the grounds of an unnecessary delay in closing the administration, and the fraud and collusion of the administrator and widow of the deceased, by which the estate was being wasted. (*Smith v. Smith*, 11 Tex., 102.)

In the case of *Dobbin, Administrator, v. Bryan*, it was decided that the District Court could entertain a suit to rescind a fraudulent sale of property by the administrator, made to the injury of those interested in the estate. (5 Tex., 276.)

In another case, it was held, that the District Court might, upon equitable grounds, reopen an account settled in the County Court; and in delivering the opinion in that case, Justice Lipscomb said, referring to the case of *Merle v. Andrews*: "It was held, upon the principles of equity jurisprudence, that as petitioner had other grounds of equitable relief presented by the petition, he might well connect therewith the moneyed demand, (not presented to the administrator for allowance,) especially as all evidence of such demand rested upon vouchers and documents in the possession of the defendant; and it would not be possible for the claimant to present his claim in the mode required by the probate law." (*Newson v. Chrisman*, 9 Tex., 116; *Long v. Wortham*, 4 Tex., 382; *Chevallier v. Wilson*, 1 Tex., 164.)

The same principle was applied to a case in the District Court, in which the amount sued for was less than \$100, and as to the amount within the jurisdiction of the Justice's Court,

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because the debt was secured by a lien which was sought to be enforced, for which the powers of the Justice's Court were inadequate. (*Hargrave v. Simpson*, 25 Tex., 396.)

Notwithstanding these cases, the tendency of our decisions has long been to discourage a resort to the District Court, in matters relating to the estates of deceased persons, where the powers of the County Court were sufficient to give the complainant full relief in the assertion of his rights, although it might produce a hardship or inconvenience on the party. (*Giddings v. Crosby*, 24 Tex., 299; *Atchison v. Smith*, 25 Tex., 230.)

What are the grounds upon which the plaintiff brought this suit in the District Court, rather than prosecute his lien in the County Court?

The facts, as exhibited in the petition, are, that John T. Deckard purchased two hundred and five acres of land from I. S. Taylor, from whom he received a deed for the same, and at the same time gave to said Taylor three notes, with Lacy and Stuart as sureties, payable at different times, for said land, and executed a mortgage on said land to Taylor, to secure the payment of said notes when they should become due. Afterwards, Taylor assigned to Bonner two of the notes only, and he and his wife guaranteed the payment of the same. Bonner held the said notes so assigned and guaranteed to him, for the use of the present plaintiffs, McDaniel and Jackson, in which capacity, he, after the death of Deckard, presented the two notes to Cannon, the administrator, who allowed them "to be paid in the due course of administration," and they were approved by the County Court; and about the same time, (in 1866,) Bonner, for the use of McDaniel and Jackson, brought suit and recovered a judgment against Lacy and Stuart, the sureties, and Taylor and wife, the assignors and guarantors of the said two notes. In entering this judgment, the clerk failed to show that it was for the use of McDaniel and Jackson. It may be presumed that the other note given for the land, secured also by the mortgage

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as well as the mortgage itself, was held by Taylor, who did not prosecute it as a claim against Deckard's estate. The petition also alleged that said estate of Deckard was insolvent, and that there were no means sufficient to pay said debt, except the land mortgaged for their security and payment.

Bonner having failed to collect the judgment that had been rendered, the plaintiffs, McDaniel and Jackson, brought this suit to have the judgment corrected, so as to show their interest, and prayed for a subrogation to the rights of Taylor and wife in the mortgage, and in the land embraced in the mortgage, and against Cannon, for adjudgment and a foreclosure of the mortgage and a sale of the land, for the payment of their said debt against the estate.

Under this state of facts, Deckard did not, by his purchase, acquire a legal title to the land, but it remained in Taylor, who, as to these notes assigned by him, held it in trust for the benefit of plaintiffs. (*Howard v. Davis*, 6 Tex., 174; *Dunlap v. Wright*, 11 Tex., 603; *Ballard v. Anderson*, 18 Tex., 377; *Baker v. Clepper*, 26 Tex., 634; *Baker v. Rainey*, 27 Tex., 59; *Robertson v. Paul*, 16 Tex., 472.)

It was shown that there was another note, equally secured by this mortgage, which Taylor did not transfer to Bonner; and as Taylor had not only assigned, but had also guaranteed the payment of the two notes which were transferred to Bonner, if there were no other fund except the proceeds of the sale of the mortgaged land out of which the two guaranteed notes could be paid, the plaintiffs might well seek to establish a priority for the payment of them over the other note not assigned to Bonner, and thereby, to that extent, have an exclusive interest in the proceeds of the sale of the land; or, if Taylor failed or declined to assert any interest on account of said note, then to be fully subrogated to the entire rights of Taylor in the land, which is the shape of the first judgment in this suit in that regard, from which Taylor and wife have not appealed. These were equities that the County Court had no adequate power to adjudicate. The advantage,

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on the part of plaintiffs, is obvious, when we consider that, if they occupy the position of Taylor, the estate cannot acquire a title to the land, or legally dispose of it to their prejudice, without payment of the notes given for it. (*Baker v. Rainey*, 27 Tex., 59; *McCreery v. Fortson*, 35 Tex., 641; *Farmer v. Simpson*, 6 Tex., 310; *Shepherd v. White*, 11 Tex., 354; *Tadlock v. Eccles*, 20 Tex., 790; *Monroe v. Buchanan*, 27 Tex., 241; *Robertson v. Paul*, 16 Tex., 472.)

If the proceeding had been instituted in the County Court, and it had been shown that the notes were the purchase-money of the land, still the land would have been conditionally subject to the homestead right. (*Harrison v. Oberthier*, 40 Tex., 385.)

And if it had not been shown in that court that the notes were given for the land, then other claims, such as funeral expenses and expenses of administration, would have had precedence over this claim. (*Robertson v. Paul*, 16 Tex., 472; *Duty v. Graham*, 12 Tex., 427.)

If plaintiffs be subrogated fully to the rights of Taylor, they would not lose their claim upon the land, though the remedy upon the notes had been lost. (*Baker v. Rainey*, 27 Tex., 59.) It would be otherwise as the mere assignees of the notes, secured by mortgage. (*Perkins v. Sterne*, 23 Tex., 561.) And if the land had been sold by order of the County Court, under this mortgage, for the benefit of plaintiffs, without notice to the party holding the other note, equally secured by the mortgage, the title might have been subject to litigation in the prosecution of the lien attached to the other note.

We have held repeatedly, that where different persons hold liens upon the same property, who are known, all persons having them should be made parties, if practicable, when the right of any one of them is sought to be enforced. (*Delespine v. Campbell*, 45 Tex., 628, and others referred to in that case.)

It would seem, therefore, that there were proper grounds for bringing this suit in the District Court, from the facts that

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are stated in the petition. It may be, that it would have been proper for other parties to have been joined in the suit, but it is not perceived that they could have had any such interest as to have rendered it imperatively necessary, as no special objection is made by any one having any interest in making them. (*Baker v. Rainey*, 27 Tex., 59; *Monroe v. Buchanan*, 27 Tex., 241; *Buchanan v. Monroe*, 22 Tex., 541.)

In the trial of the case, questions were raised about the vendor's lien, and the waiver of it, by taking sureties on the notes, and by bringing a suit on the notes first, without including the lien. It is not seen how these questions can be brought into this case. The notes were secured by a mortgage, which was probably given for the security of the sureties; and it has often been held by this court, that a lien is not lost by bringing a suit first upon the notes, without including the lien.

In the defense by the administrator, it is not pretended that the notes have been paid, or that he has any legal or equitable defense against them, other than the alleged irregularities of plaintiffs in their efforts to collect them. It is evident from the record, that the administrator has been actively engaged in the effort to appropriate the land, in which the estate never had any legal title, to other purposes, without one dollar of the purchase-money having been paid, for which the land is bound by express mortgage lien, given to secure the notes when the land was purchased. (*Fisher v. Foote*, 25 Tex. Supp., 311; *Hargrave v. Simpson*, 25 Tex., 397; *McAlpine v. Burnett*, 19 Tex., 500; 17 Tex., 500.)

It is deemed proper to state, that we, after a thorough examination, have had no little difficulty in coming to a satisfactory conclusion upon the points raised in the case, now necessary to be decided; as it has been held up some time, and has to be decided, it has been thought proper to discuss only such questions as relate to the jurisdiction of the District Court; and, in support of what seems to be a meritorious cause of action, we conclude that there are facts enough

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stated in the petition to maintain the action against the administrator in the District Court.

The verdict of the jury is in favor of the plaintiffs, against the administrator for the amount of the judgment in 1866, with ten per cent. interest thereon rendered against other parties, instead of for the amount of the principal and interest on the notes, due at the time of the last judgment; and for a vendors' lien upon the land, instead of for a lien by virtue of the mortgage set out in the plaintiffs' pleadings; and in the judgment, it is directed that execution shall issue from the District Court, to sell the land, in satisfaction of the judgment;—all of which is clearly erroneous.

The estate was not liable for more than the principal and interest on the notes. There was no vendors' lien, properly as such, declared upon, but a mortgage given to secure the purchase-money; and though the verdict and judgment had been properly rendered, it should have been ordered to be executed by the administrator, in the administration of the estate. (*Bogges v. Lilly*, 18 Tex., 200; *Fortson v. Caldwell*, 17 Tex., 628.)

Judgment is reversed, and cause remanded.

REVERSED AND REMANDED.

T. V. BOARD ET AL. V. TEXAS AND PACIFIC R. W. CO. AND
OTHERS.

1. **PARTIES.**—In a suit by tax-payers of a county, to annul proceedings of the County Court authorizing the issuance of bonds of the county, and to enjoin the collection of taxes to pay interest on such bonds, the bondholders are necessary parties.
2. **LIS PENDENS.**—Discussed; and intimation that *lis pendens* would be notice under our statutes from the filing of the bill or petition, where reasonable diligence was had to obtain service of citation, either by personal service or by publication.

Argument for the appellants.

3. COUNTY BONDS.—Such bonds must be treated as commercial paper, and their holders entitled to the privileges and immunities attaching to negotiable instruments. They are not, therefore, within the rule of *lis pendens*.
4. PRACTICE.—The allegation that county bonds had been fraudulently issued and delivered to the railroad company, and by it had been passed to parties, with full notice of the fraud, will not obviate the necessity of bringing the bondholders before court as parties.
5. SAME.—To confer power to annul such bonds, the holders should be parties, and the instruments brought under the control of the court, so as to await its action upon their validity, &c. Courts do not sit to determine abstract principles, but to decide practical issues, and to settle issues in which the litigants have a substantial or immediate interest.
6. COUNTY BONDS.—Nor will the court, as against the railroad, annul the bonds, as against the county, and adjudge that payment therefor be provided by the railroad; such action would impair the rights of the bondholders.
7. MANDATORY INJUNCTION.—See allegations held insufficient to warrant its issuance.

APPEAL from Harrison. Tried below before the Hon. M. D. Ector.

The opinion contains a statement of the case, as acted on by the court. A history of the litigation is given in the briefs of counsel, which are given entire.

H. McKay & W. S. Coleman, for appellants.—Appellants submit that plaintiffs' pleadings show a good cause of action. Assuming, upon demurrer, all the allegations in plaintiffs' pleadings to be true, the pleadings show that the County Court had no authority in law to submit to the voters of said county the proposition submitted and voted upon, because the proposition submitted and voted upon was not within the scope or meaning of the Constitution or laws of this State upon the subject of aid to railroads or works of internal improvement; and that upon the proposition submitted, no valid election could have been ordered or held, and none such was ordered or held. The petition shows that the proposition submitted to the voters of said county was not one

Argument for the appellants.

to aid in the construction of a work or works of internal improvement in the State of Texas. Appellants say that the County Court could not, by law, submit any other. (The proposition being whether the county will donate to the Texas Pacific Railroad the sum of three hundred thousand dollars in the bonds of the said county, * * * to aid in the construction, &c., conditioned that the eastern terminus of said road be established at Marshall, &c.) See Constitution, 1869, art. 12, sec. 32; Paschal's Dig., art. 7369 *et seq.*

Appellants say, that plaintiffs' pleadings show that there was no valid order by the County Court for an election, and that there was no valid election upon said proposition, because the order of the County Court directing the manner of said election, and the manner in which said election was held, was contrary to the Constitution and laws of the State, then of force. (See Constitution 1869, art. 3, sec. 1, and art. 6, sec. 1, and Paschal's Dig., art. 7372.)

Appellants submit that their pleadings show that it was not lawful for the County Court or any other authority to issue to said company the bonds of said county, because the pleadings show that less than the number of votes required by law were cast for said proposition, in this: that less than two-thirds of the qualified voters of said county voted for said proposition.

And we submit that the petition shows that the issuance of said bonds was unlawful, because the said railway company did not accept the proposition submitted to and voted upon by the electors of said county, but that said company refused to accept it, and made its acceptance dependent upon the happening of a contingency beyond the control of said county; and that said company neither did do, nor undertake or promise to do, any act or thing which it was not required to do by the positive requirements of its charter; so appellants say that there was no consideration whatever for the issuance of said bonds, and that this appears from plaintiffs' pleadings.

Argument for the appellants.

(See Laws, chartering and amending the charter of said company, Acts of March, 1871, and May, 1872.

Appellants submit that their pleadings show a good cause of action, in this: that they show that the said company had failed to comply with the material and important terms contained in the proposition submitted to and voted upon by the electors of said county.

Plaintiffs' pleadings show a great fraud perpetrated by one of the defendants, the said railway company, by and through its agents and officers upon the plaintiffs, with the purpose and intent of fraudulently obtaining from said county the large sum of three hundred thousand dollars, in the bonds of said county, without any consideration or benefit to said county or its citizens, or to the plaintiffs, and without any right to said bonds, to the great and irreparable damage of the plaintiffs. The plaintiffs' amended petition shows that after the filing of the plaintiffs' original petition, the said railway company, in pursuance of its fraudulent purpose, and by its fraudulent devices, did obtain from the presiding justice of the said County Court the bonds of the said county, to the amount of the said sum of three hundred thousand dollars, and by fraud obtained the registration of said bonds by the comptroller of public accounts of the State of Texas, and that the said company sold said bonds to parties charged with, and actually possessed of knowledge of all the frauds connected with the issuance and registration of said bonds.

Appellants respectfully submit, that the pleadings in this cause abundantly show an eminently proper case for the intervention of the powers of the District Court, to prevent a great and irreparable wrong to plaintiffs, that could in no other way be reached, and that that court erred in sustaining the defendants' demurrer and in dismissing plaintiffs' suit. (See Constitution 1869, art. 5, sec. 7; *Dobbin v. Bryan*, 5 Tex., 276; *Newson v. Chrisman*, 9 Tex., 113; and *Lott v.*

Ballard, 21 Tex., 167, which authorities, we think, support this view.)

Upon the matter of the non-acceptance of the terms of the proposition by the railway company, appellants respectfully refer the court to 1 Parsons on Contracts, 400, and to Story on Contracts, paragraphs 380, 381, and to High on Extraordinary Remedies, paragraph 391.

In support of the allegations in plaintiffs' pleadings, that the conditions named in the proposition submitted to the electors had not been complied with by the railway company, appellants respectfully and specially invite the attention of the court to the opinion of the Supreme Court of the United States, in the case of the Town of Concord v. Portsmouth Savings Bank, rendered at October Term, 1875, and reported in the Central Law Journal, of date July 2, 1876, p. 350;—the question of the rights of innocent holders not entering into the consideration of the case before the court, as it will be seen from the transcript that this suit was filed before the bonds were issued, and long before they were registered in the office of the comptroller of the State, and without which registration the bonds were not negotiable. For these reasons, appellants submit that the judgment of the court below should be reversed, and the cause remanded.

Stedman & Sexton, for appellees.—The appellees respectfully submit that the decision of the court below is correct, and should be in all things affirmed.

I. The petition of the plaintiff was for an injunction. It asked no other remedial process. Plaintiffs failed to obtain the injunction asked for, because they could not give the required bond. The answers of the defendants and the amended petition of the plaintiff show that the action of the County or Police Court of Harrison county—to wit, the issuing of the bonds described in the original petition—was fully accomplished before the case came on to be heard. Defend-

Argument for the appellees.

ants insist that they were issued before the filing of the original petition. The petition being for an injunction only, it was *functus officio* when the action it sought to restrain, was performed.

“If the injury be already done, the writ can have no operation, for it cannot be applied constructively, so as to remove it.” (Hill. on Injunc., p. 6, sec. 5, referring to Attorney General v. New Jersey, 2 Green, 136; Cobb v. Smith, Wis., 661.)

II. The action of the County Court of Harrison county, in issuing the bonds referred to in the original and amended petitions, cannot be inquired into, in the manner proposed by this suit.

The “act to authorize counties, cities, and towns to aid in the construction of railroads and other works of internal improvements,” (Paschal’s Dig., art. 7369, *et seq.*) confers upon the County Court full power and authority to submit the proposition, in the first instance, to the voters of the county, and then to determine whether or not all the provisions of the law were complied with. All the questions presented by the plaintiffs in their petitions in the court below, and by their brief in this court, were proper for the consideration of the County Court of Harrison county, were considered and decided by that court, and its action in regard to them was the action of a court of competent jurisdiction upon matters which it was authorized by law to determine. That court has determined, finally, all the questions presented by the appellants. There was no appeal from its action by the appellants who were in that court, (the County Court of Harrison county,) and contested the application made for the bonds by one of the appellees here. We think no appeal was provided by law from the action of that court. If its action could be reviewed at all, which we are not required to deny, certainly it could not be done by an injunction. We believe this court has, in effect, decided this question, in an opinion rendered at the Galveston Term, 1876, in the case of Austin

Argument for the appellees.

v. The Gulf, Colorado, and Santa Fe R. R. Co., 35 Tex., to which we refer. We refer to the case of "The Town of Coloma v. Evans," decided by the Supreme Court of the United States, October Term, 1875, (Central Law Journal for May 19, 1876, p. 325,) and "Marcy v. The Township of Oswego," (Ib., for June, 1876, p. 389.)

III. The suit was to enjoin the issue of the bonds, and for that purpose the County Court, as well as the railroad company, were made parties; but before the plaintiffs placed themselves in a condition to demand the writ, the court acted, and the bonds were delivered. The effect of this was to dismiss the County Court from the suit as a necessary party. The petition then proceeds to show that the railway company had parted with the bonds, which, so far as the injunction is concerned, likewise dismisses the company as a necessary party.

The writ of injunction will not issue to prevent a prospective injury, unless it appear that the danger is immediate, and will be likely to occur unless the writ be granted. (See Hilliard on Injunction, pages 8, 9, secs. 6, 7.)

But the amendment goes further: it shows that the sheriff, who was made a party, has no direct interest in the suit, except as a ministerial officer, charged with the performance of a duty, and shows that the bonds have been traded to persons who are not parties.

The real parties in interest are the bondholders; and before their rights can be adjudicated in any manner, they must be made parties. (Story's Eq. Jur., vol. 2, sec. 1529.)

The only remaining question arises on that portion of the amendment that seeks to make the railway company provide a fund for the redemption of the bonds and the payment of the interest accruing thereon. In our present view of the case, it is unnecessary to discuss whether the railway company could in any event be made to provide for the bonds. It is only necessary to say, that by this amendment the original cause of action is abandoned, and an entirely new action

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commenced. The plaintiffs have not paid the cost, nor offered to pay.

An original cause of action may be changed, altered, or amended, under our system of pleading, so as entirely to change the purposes for which the suit was instituted; but in that event, the party must place himself in the same situation as if he had dismissed his first suit and brought another; and it has been even held, that where the action is changed by amendment, the statute of limitations runs against the new cause up to the date of the filing of the amendment. (See 1 Tex., 605; 15 Tex., 127; 17 Tex., 34; 8 Tex., 46; 7 Tex., 57; 13 Tex., 464.)

In no possible event can the appellants maintain any character of action until they can aver and prove that the payment of the tax has been demanded and refused, and then that the payment of it is about to be enforced by levy and sale of property; and then the action must be brought on behalf of themselves and all other tax-payers of the county. (*Dows v. The City of Chicago*, 11 Wallace, 108.)

MOORE, ASSOCIATE JUSTICE.—This suit was brought by appellants, citizens of Harrison county, to annul certain proceedings had in the County Court of said county, ordering that bonds of said Harrison county for \$300,000 should be issued and delivered to appellee, the Texas and Pacific Railway Company, as a donation by said county, to aid in the construction of its railway, and to enjoin the clerk of the County Court from attesting said bonds, the chief justice of said county from issuing, and said railway company from demanding and receiving them.

On an application to Hon. M. D. Ector, judge of the sixth judicial district, in which said county of Harrison is situated, before the filing of the petition, an order was made by said judge in chambers, that an interlocutory injunction, as asked for, should be issued on the petition being filed, and bond for the sum of \$100,000 being given by plaintiffs. The

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plaintiffs, however, failed to give bond as required, and consequently the injunction prayed for was not issued. But the petition having been filed, on the 6th of June, 1874, citations were issued which, on the 8th of said month, were regularly served upon the defendants, who in due time entered their appearance and answered the petition. And at the January Term, 1876, of the District Court for Harrison county, the case came on to be heard on a demurrer of the defendants to the petition; and the court holding the demurrer well taken, the plaintiffs amended their petition, and, among other things, alleged that said Texas and Pacific Railway Company had fraudulently procured all of said bonds, referred to in the original petition, to be signed by the chief justice of said County Court, and to be countersigned by said clerk and attested with his official seal; and that said chief justice had delivered them to the comptroller of the State, by whom, after they were registered and indorsed, they had, on or about the 10th of May, 1874, been delivered to said railway company; and that said company having, by illegal means and devices, obtained possession of said bonds, with the fraudulent intent and purpose of preventing the legality of the proceeding whereby they were procured to be issued from being inquired into, had, on to wit, about the 30th day of May, 1874, transferred and assigned all of them to some person or persons to plaintiffs unknown, for the full face value thereof; but that said persons to whom said bonds had been so transferred by said company and the then holders of them, took them with full notice of the fraudulent practices and devices, by means of which said bonds were caused to be issued, and by which their delivery to said company by the comptroller was procured.

The relief prayed for by the plaintiffs in their amended petition is, in substance, that all the orders and proceedings of the County Court in the premises be held void and of no effect; that all of said bonds be adjudged and declared null and void, and the special tax levied by said County Court

for their payment be revoked and repealed; or if it should be found that said bonds had gone into the hands of innocent parties, without notice of said frauds, whereby they were procured, and that in law and equity they should be paid to the parties holding them, they pray, in that event, that said Texas and Pacific Railway Company "be adjudged and held to provide for the payment of the same," &c., and that the order of the County Court levying a special tax for this purpose be annulled.

To the petition as amended, the defendants again excepted, and their exceptions were sustained; and plaintiffs declining to further amend, final judgment was given by the court against them on the exceptions.

It is altogether unnecessary, in the attitude in which they are presented in this record, for us to consider or undertake to determine the several questions mainly discussed by appellants' counsel, touching the validity of the bonds, to enjoin the issuing of which the suit was first brought. Whatever conclusion we might be inclined to form as to them, we think it manifestly appears from the petition and amended petition that the parties interested in the subject-matter of the suit are not before the court. If it is conceded that the judgments or orders of the County Court, brought in question by appellants, can be reviewed, and if found to be erroneous or unauthorized, revoked and annulled by an original suit, brought for this purpose in the District Court by an inconsiderable fraction of the citizens and tax-payers of the county, evidently the holders and owners of the bonds are immediately and directly interested in the suit, and should be made parties to it.

Appellants' counsel do not deny or attempt to controvert this well-established elementary principle. They maintain, however, that it is inapplicable in this case, because, as they say, appellees, the defendants in the court below, were the only parties having or claiming any interest in upholding or maintaining the validity of the judgments, orders, and pro-

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ceedings of the County Court which they desire to review, or who claimed any right to or interest in the bonds which appellants were seeking to have canceled and annulled when the suit was instituted; and although they allege in their amended petition that the bonds had been transferred by appellees to the then holders of them, for their full face value, yet, as it appears they must have been so transferred after the filing of their original petition, the holders acquired whatever interest they have to them *pendente lite*, and are not therefore, as they maintain, entitled to be made parties to the suit, but must abide its result against those from whom they purchased.

If the rule of *lis pendens* is applicable to the persons to whom appellants allege, in their amended petition, these bonds were transferred by the Texas and Pacific Railway Company, unquestionably the objection that these parties have not been brought before the court is untenable. It may, however, be well questioned whether there was a *lis pendens*, such as operated as constructive notice to the purchasers at the time these bonds were transferred. The determination of this point depends upon whether *lis pendens* begins from the filing of the petition or the service of the citation. This question, as far as we are aware, has not attracted the attention of this court; but elsewhere it seems to be generally held to commence, unless it is otherwise provided by statute, from the service of the subpœna and the filing of the bill.

Says Chancellor Kent, who, by his decision in the case of *Murray v. Ballou*, 1 Johns. Ch., 566, seems to have first grafted this doctrine into American jurisprudence: "The *lis pendens* begins from the service of the subpœna after the bill is filed." And says Mr. Commissioner Earl, in the case of *Leitch v. Wells*, 48 N. Y., 585: "I therefore hold that there is no *lis pendens*, so as to give constructive notice to strangers, until a summons has been served, and a complaint, distinctly stating the subject of the litigation and specifying the claim

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made, has been filed in the proper clerk's office." "The rule," he adds, "as thus stated, is sufficiently hard and unreasonable." And says Mr. Freeman, in his valuable work on Judgments: "While *lis pendens* can in no case commence at common law until process is issued and served, a constructive service produces the same effect as a personal service. Whenever the service may be made by publication, the *lis pendens* is complete upon the actual publication of the notice for defendant to appear; but it seems there is no *lis pendens* until the order for publication is fully executed. The acceptance of service, as of a prior date, in pursuance of a previous agreement, will not bind any lands conveyed prior to the time when the acceptance of service was in fact made. Where a defective subpœna was served, and afterwards the service was set aside and the subpœna amended so as to bear date the day the service was set aside, it was held that *lis pendens* did not begin until service of the amended subpœna." (Freem. on Judg., sec. 195, and cases cited.)

It should be observed, however, that in some of the courts, where it is held that constructive notice of *lis pendens* dates from the service of the subpœna and filing of the bill, the suit or action is begun by issuing the subpœna, or other process, and not as with us, by the filing of the petition or bill setting forth the cause of action. Hence, a stranger to the action would have an opportunity of informing himself of the existence and nature of the suit here by the filing of the bill, which would not be afforded merely by service of a subpœna. And it may be that public policy, from which this rule springs, should give it effect with us from the filing of the suit, if due and reasonable diligence in procuring service and prosecuting the suit is shown.

But, as there is another answer to appellants' position, that the parties to whom these bonds were transferred pending the suit are subject to the rule of *lis pendens*, which is conclusive, we need not at present make an authoritative decision as to the time at which, with us, it begins.

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Whatever difference of opinion there may have been in the professional mind in regard to securities of the character of these bonds, it must be conceded that it is now too well settled, by the overwhelming weight of judicial decision, for those entertaining a different opinion, to maintain that they should not be treated as commercial paper, or that the holders of them are not entitled to the privileges and immunities attaching to negotiable instruments. (Dillon Muncip. Corp., sec. 405; note Daniel on Nego. Inst., sec. 1500, and cases cited.) In the courts of Pennsylvania alone, it is believed the contrary doctrine is still maintained. The Supreme Court of that State, while denying that such bonds are negotiable instruments, says: "We have said on several former occasions, that we will not treat bonds like these as negotiable securities. On this point we stand alone. All the courts, American and English, are against us." (*Diamond v Lawrence County*, 37 Penn. St., 353.)

And there is not even one solitary exception to the universally recognized rule that negotiable instruments are not within the rule of *lis pendens*. "There is no case," says Mr. Powell, in his work on mortgages, (2 vol., 618,) "in which equity has determined the property in goods to be effected by reason of a *lis pendens*, where possession is the principal evidence of ownership, as of personal chattels." And Mr. Freeman, while he insists that it must be conceded that at this day *lis pendens* applies with equal force to controversies in regard to personal property, as in real actions, and that commercial paper not past due is the only exception to the universal application of the rule, says: "The necessity of preserving the negotiable character of negotiable paper not due, so as to require no inquiry beyond inspection of the paper itself, in relation to its ownership, has frequently been considered paramount to the necessity of avoiding transfers *pendente lite*, and that class of paper is the only property not liable to the doctrine of *lis pendens*." (Freeman on Judgments, sec. 194; *Krieff v. Ehler*, 13 Penn. St., 388; *Dia-*

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mond *v.* Lawrence County, 37 Penn. St., 353; Day *v.* Zimmerman, 68 Penn. St., 72; Murray *v.* Lylburn, 2 Johns. Ch., 441; Winston *v.* Westfeldt, 22 Ala., 760.)

It is also insisted by appellants, as it is alleged in the petition, that the holders took the bonds with full knowledge of the frauds through which they were procured; and as they hold them by no better title than did the Texas and Pacific Railway Company before they transferred them, they are open to the same defenses in their hands as in the company's, and therefore the holders need not be made parties. But this is no answer to the objection that the holders of the bonds should be parties to the suit; for if they have no better title to them than said company, they are nevertheless entitled to be heard before a decree is made in any way affecting their rights.

And even though the parties to whom the bonds were transferred had notice of the fraud by which they were procured, if they were in fact procured by fraud, how can the court know that they will not pass into the hands of innocent parties before the case is tried, and that its judgment will be either inoperative and useless, or injuriously affect the rights of parties who have had no notice of the suit, and no opportunity of being heard in vindication of their rights. "When such paper is the subject of the suit, the court ought to require it to be brought into court, or so placed that the defendant cannot commit a fraud upon the law by making the judgment unavailable." (Freeman on Judg., sec. 194.) And it would seem, unless the plaintiff will take the necessary steps to have this done, he would have no right to ask the court to render an unavailable judgment. Courts do not sit to determine abstract principles, but to decide practical issues, and settle controversies in which the litigants have a substantial or immediate interest.

It remains to inquire, as it is held that the court did not err in holding that plaintiffs' petition was insufficient to warrant a judgment annulling the bonds, should it have

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given the alternative judgment prayed for by the defendants, viz, that the Texas and Pacific Railway Company be compelled to pay the principal and interest of said bonds, and that the tax assessed for this purpose be repealed?

That a judgment of this kind is not authorized by anything in the petition, is, we think, too obvious for discussion. To repeal the tax for the payment of the principal and interest of the bonds, would impair the rights of the bondholders, is beyond question. The plaintiffs have no right to ask the court to require them to accept a different security for the payment of the bonds to that given by law. The judgment asked is of an extraordinary character. It could probably be only made effective through a mandatory injunction, by which the company, under penalty of attachment, would be required to pay to the collector of taxes the amount annually assessed for the payment of the bonds. The plaintiffs have no interest in this matter beyond the amount of their own assessment. They do not allege how much this is, or that payment of it has been demanded of them; or, if they should be wrongfully compelled to pay said tax, that there is reason to fear that they will thereby suffer irreparable injury. Nor do they show any reason whatever for the interposition of a court of equity, and the granting of the extraordinary and unusual relief asked for.

The judgment is affirmed.

AFFIRMED.

J. W. FLANAGAN, ADM'R, v. B. BOGGESS ET AL

1. PRACTICE—ERROR IN IMMATERIAL ISSUE.—An erroneous ruling, in admitting evidence, authorizes a reversal when it may have operated to the prejudice of the party complaining, but not otherwise.
2. ASSIGNMENT OF ERRORS.—An assignment, that “the court erred in its charge,” is too general to require attention.
3. CHARGE OF COURT.—A charge assuming a fact not in evidence is properly refused by the court.

Statement of the case.

4. **DESCRIPTION OF LAND IN TAX DEEDS.**—*Held*, That “620 acres of the headright of David Brown, situate about twelve miles north of Henderson, in the neighborhood of Bellview,” used in a tax deed, is a sufficient description of land to form a basis for five years’ limitation.
5. **TAX DEED—LIMITATION.**—When a tax deed gives what, on its face, appears to be a sufficient description of the land conveyed, and there is no evidence developing any latent uncertainty, the authorities do not decide that such a deed does not satisfy the statute of limitations.
6. **PRACTICE—EXCLUSION OF TESTIMONY.**—Where the exclusion of testimony is claimed to be erroneous, the party injured should show, by bill of exceptions, what objections were made to the testimony, and why it was excluded.
7. **PAYMENT OF TAXES—FIVE YEARS’ LIMITATION.**—This court is not prepared to hold that, to support the bar of five years’ limitation, it was necessary to prove payment of taxes during the time the statute was suspended.
8. **LIMITATION—POSSESSION.**—See facts held insufficient to show that defendant, setting up title under a tax deed and five years’ possession, paying taxes, &c., had adverse possession as against the plaintiff.
9. **SAME.**—Where the husband of one of several heirs entitled to an estate bought lands of the estate at tax sale, and afterwards the administrator of the estate called on him and offered to repay the money expended in the purchase at the tax sale, and the money was refused, the purchaser saying that “we are all interested,” and postponing the settlement: *Held*, That such purchaser’s possession under the tax deed would not be adverse, unless it could be shown that he repudiated the trust, and such repudiation was brought to the notice of those interested in the estate.

APPEAL from Rusk. Tried below before the Hon. M. D. Ector.

December 5, 1873, J. W. Flanagan, as the administrator of George Pierce, brought an action of trespass to try title against Braziel Boggess, for 640 acres of land, the headright of David Brown.

Giles Boggess, jr., made himself a party defendant as landlord of the original defendant, setting up title by purchase of the land at tax sale, and limitation of five years under the tax deed, duly recorded, &c.

Statement of the case.

In support of his title, plaintiff read in evidence a copy of a patent to Brown, and the papers in a suit by the heirs of David Brown and Mrs. Brown against one W. L. Park, in which suit Elizabeth Pierce, then administratrix of the estate of George Pierce, was made a party defendant. This suit was brought to cancel a deed from Brown to Pierce, because he was *non compos*, and also to recover Mrs. Brown's community in the land. The suit was brought to the Spring Term, 1856, and at the Spring Term, 1869, judgment was rendered for defendants. These papers, and a deed and bond from David Brown to George Pierce, constituted the plaintiff's title.

Defendant offered papers from the Probate Court in the administration of the estate by Elizabeth Pierce, which were objected to and excluded. The papers showed proceedings in the estate tending to show a sale, to W. C. Pierce, of the land. Administration had been granted to Daniel Pierce, and then to Elizabeth Pierce, the widow.

Defendants also offered a tax deed for "620 acres of the headright of David Brown, situate about twelve miles north of Henderson, in the neighborhood of Bellview." The sale was made under an assessment of 620 acres, assessed for 1854, as the property of George Pierce, and sold, in 1855, to Giles Boggess.

Boggess, over objection, testified that the notices of the tax sale were correct and regular, though he could not recollect their contents. It was also shown that Boggess took possession of the land in 1856, and had held possession, by tenants, ever since, except a year or two during the war, and paid taxes during the corresponding time. The plaintiff also testified that he had leased the land in 1861 and 1862, but never saw the party to whom he leased since, or collected the rent, and did not know that his lessee went upon the land.

It was also shown by plaintiff, that Giles Boggess' wife was an heir of George Pierce, and that shortly after the tax sale, David Pierce, then administrator of the estate of George Pierce, offered to redeem the land from Boggess, who then

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said, "it made no odds about the taxes; to let it alone until the lawsuit then pending (the suit by the heirs of Brown) was decided; that all of them were interested, and after the suit was decided they could fix it up."

The tax deed was objected to, because the prerequisites to sale had not been shown. It was also in evidence that David Brown, at the date of his deed to George Pierce, did not have capacity to make a contract.

The plaintiff asked the court to charge the jury, that if suit was brought by Brown's heirs against Parks, the tenant of of Boggress, and that said tenant and Elizabeth Pierce, former administratrix of George Pierce, (plaintiff's intestate,) defended said suit, claiming said property as the property of her intestate, the possession of said tenant (Parks) was not adverse to plaintiff during the pendency of said suit.

The jury found for the defendants. Motion for new trial was overruled, and Flanagan appealed.

The errors assigned are discussed in the opinion, except the third error, which was as follows: "The court erred in its charge to the jury."

R. M. Winn & N. G. Bagley, for appellant, cited Blackwell on Tax Titles, 64, 342, 450; *Kelly v. Medlin*, 26 Tex., 53; *Yenda v. Wheeler*, 9 Tex., 408; *Pitts v. Booth*, 15 Tex., 453; *Neill v. Cody*, 26 Tex., 286; *Robson v. Osborn*, 13 Tex., 305; *Wofford v. McKinna*, 23 Tex., 44.

James H. Jones, for appellee, cited *Elliott v. Mitchell*, 28 Tex., 107; *Howard v. Colquhoun*, 28 Tex., 134; *Garner v. Cutler*, 28 Tex., 175; *Wofford v. McKinna*, 23 Tex., 43; *Yenda v. Wheeler*, 9 Tex., 408.

GOULD, ASSOCIATE JUSTICE.—Under the charge of the court, it is evident that the jury found for the defendant on the plea of five years' limitation, and not upon the ground that the deed from the assessor and collector conveyed a valid title

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It is not, therefore, necessary to inquire whether the court erred in allowing Giles Boggess to testify as to the regularity of the advertisements of the tax sale, for if this was an error, it is apparent that it could have had no influence on the result of the trial. An erroneous ruling in admitting evidence authorizes a reversal, where it may have operated to the prejudice of the appellant; but not otherwise. (*Willis v. Chambers*, 8 Tex., 151.)

The assignment, that the court erred in its charge, is too general to require attention. We cannot say that the court erred in refusing the charge asked by appellant. The charge assumes that there was evidence that Parks was the tenant of Boggess, and it may have been rejected by the court, on the ground that there was no evidence of such tenancy. The record shows that a suit was brought against Parks, in 1856, as in possession of the land, and that in his defense he claimed to be in possession as the lessee of William C. Pierce, who held under a purchase from the administrator of the estate of George Pierce, deceased. It further appears that the administratrix of George Pierce's estate appeared and defended this suit in connection with Parks. It nowhere appears that appellee claimed that Parks was his tenant. It is true that he testifies that he held possession of the land in 1856, when that suit was brought against Parks; but there is nothing whatever to show that his possession was not by himself, or some other person than Parks. So far as the statement of facts shows, the defendant's claim of five years' limitation was wholly independent of, and disconnected with, Parks's possession, if, indeed, (for there is no other evidence on the subject,) the fact that Parks was sued, is sufficient to show that he was in possession at all.

The sixth assignment claims that the tax deed under which defendant claimed, did not describe the land with sufficient certainty. Although it does not appear that this objection to the deed was taken on the trial, it might be claimed that if there was such uncertainty of description on the face of the

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deed as to make it void, that the objection goes to the foundation of the defense, because the deed is not such as is contemplated by the statute. (*Wofford v. McKinna*, 23 Tex., 36.) Treating the question as properly before us, we are of opinion that the land is described with sufficient certainty to satisfy the statute. The description given is, "six hundred and twenty acres of the headright of David Brown, situate about twelve miles north of Henderson, in the neighborhood of Bellview."

The object of the statute, in making registry of the deed necessary to enable the possessor to avail himself of the five years' limitation, is to give notice to the owner that the defendant in possession is claiming under the deed; and if there is such falsity or uncertainty of description as that it will not answer the purpose intended, it cannot be considered a deed duly registered under the statute. (*Kilpatrick v. Sisneros*, 23 Tex., 136.) It is to be observed of this reason, that it applies with no greater force to tax deeds than to any other. But if the distinction taken in *Wofford v. McKinna*, and *Kilpatrick v. Sisneros*, between tax deeds and other deeds, be admitted, those cases go no further than to hold such deeds not to be deeds duly registered under the statute, where there is on their face such uncertainty of description or such contradictory description that they do not serve to designate the land conveyed. Where a tax deed gives what on its face appears to be a sufficient description of the land conveyed, and there is no evidence developing any latent uncertainty, these cases do not decide that such a deed does not satisfy the statute.

The deed in the case before us does not purport to convey an undefined part of a larger tract of land, as in the case of *Wofford v. McKinna*. The "620 acres of the headright of David Brown" may be all of the D. Brown headright located in that survey, the balance being elsewhere. Or if we look to evidence where we find a patent calling for six hundred and forty acres, we also find that the land was given in as

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six hundred and twenty acres, and it may be that the latter is the real number of acres. In either case the description is not of an uncertain part of a tract of land, but of an entire tract. The name of the headright and the locality, with the number of acres of the survey, fixes the land as definitely as seems to be necessary to satisfy the statute until there is evidence showing the contrary.

It is also assigned as error that the court erred in excluding the records of the County Court. The brief reference to this ruling, which is embodied in the statement of facts, does not state what objection was made to the testimony, nor for what reason it was excluded. We are not furnished with sufficient data to enable us to say that there was error in excluding this record. It is for the party claiming that there was error, to show it by a bill of exceptions presenting the question passed upon.

Another assignment of error is, that the court erred in refusing a new trial. Under this assignment it is urged that the defendant failed to prove payment of taxes as required under the statute. He testified that "he had paid the taxes on the land every year after his purchase, except, perhaps, one or two years during the war." During the war, the statute was suspended, and we are not prepared to hold that it was necessary to prove payment of taxes for any other period than that during which the statute was running.

A more serious objection to the verdict arises out of the testimony of D. Pierce, to the effect that during the pendency of the suit between David Brown and the Pierce estate, (meaning the suit against Parks, to which the estate by the administratrix became a party,) he, being then the administrator of the estate, applied to defendant Boggess, whose wife it elsewhere appears, was one of the heirs entitled to the estate, for the purpose of repaying him the amount he had paid out in buying in the land at tax sale, and that Boggess said, "that it did not make any odds about taxes; to let that alone until the law suit then pending was decided, then it

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could be settled; that we were all interested, and after the law suit was decided we could fix up." This evidence is uncontradicted by defendant, although he was himself a witness in the case. He says that he went into possession of the land March 16, 1856, and held possession continuously under his deed until he went to the army in 1861. Now, the suit so often alluded to was not commenced until April —, 1856; and as Boggess fixes the commencement of his possession at a period anterior to this date, and necessarily anterior to the proffer made by Pierce to settle the taxes, it seems that his possession was not, in its commencement, adverse to the estate. Neither he nor any other witness testifies that his possession was adverse to the estate, nor do they testify to any fact which would show that at any time before the termination of that suit in 1869 he ceased to act in holding the land in the interest of the estate or of the heirs of George Pierce. If the testimony of D. Pierce be regarded as establishing that Giles Boggess did not originally enter possession under such circumstances as to make his possession adverse to the title of the plaintiff, but that his possession originally was in subordination to that title, and such to our minds is the effect of the testimony, there is nothing whatever in the testimony to show that he subsequently repudiated holding for the benefit of the estate, so as to give notice that he was claiming the land for himself. Under this view of the evidence, there was a failure on the part of defendant to show that his possession was adverse, and for this reason the court should have granted a new trial. We have arrived at this conclusion with some hesitation; but as the case has already been held up one term, and it is our duty to decide it, we announce as our decision that the verdict of the jury was contrary to, and unsupported by the evidence, and that for this reason the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Statement of the case.

WILLIAM WATT, ADM'R, v. WHITE, SMITH & BALDWIN.

1. **REMOVAL OF CAUSES TO THE UNITED STATES COURTS.**—Under act of Congress of March 3, 1875, a party desiring to avail himself of the privilege of removing his cause to the United States courts is required to file his petition for such removal before the trial has begun: *Held*, That an application filed after the cause was called for trial, and the plaintiff had announced ready, and time had been granted the defendant to present an application for continuance, came too late, and was properly disregarded by the court.
2. **SAME.**—The failure to present an application for such removal for several courts after the case is at issue, is a waiver of the right to such change, the application not having been presented "on or before the term at which the said cause could be first tried."
3. **CASES DISCUSSED.**—*Watts v. White, Smith & Baldwin*, 33 Tex., 421, and *White, Smith & Baldwin v. Downs*, 40 Tex., 225, discussed.
4. **CLAIMS AGAINST AN ESTATE.**—In an appeal in a suit between parties, for priority of lien and against an estate, one of the lien holders, on appeal, cannot object that the party obtaining judgment against the estate enforcing the vendors' lien, (for benefit of which the litigants were contending,) had not presented his claim to the administrator duly authenticated, when in such case the administrator had not appealed.
5. **SAME.**—The holder of a note secured by a vendors' lien and indorsed by the payee, who has since died, is not required to present the claim to the administrator of the indorser before enforcing the vendors' lien against the estate of the original maker of the note; if it would advantage the estate of the indorser to have the claim against the maker, he should have taken up the note, whether presented or not.
6. **SALE UNDER INTERLOCUTORY ORDER.**—Where an injunction issued, restraining the sale of land under a claim established by the defendant in the injunction suit, and a sale was ordered upon making a bond to secure the plaintiff in the injunction suit, and under such order, sale was made: *Held*, Error, in subsequent proceedings, to hold the sale a nullity in favor of the plaintiff in the injunction suit, on his successful establishment of his superior right to the security of the lien upon the land so sold.

APPEAL from Harrison. Tried below before the Hon. M. D. Ector.

This cause was, by appeal, before the Military Supreme Court of Texas, *Watt v. White, Smith & Baldwin*, 33 Tex.,

Argument for the appellee.

421, and again *White, Smith & Baldwin v. Downs*, 40 Tex., 225.

An effort was made to remove the case to the United States Circuit Court for the Western District of Texas. The proceedings on this application are shown in the opinion.

The facts are few additional to those appearing in the former appeals. The objections urged to the claim of White, Smith & Baldwin to enforce, by decree against Coyle's estate, the vendor's lien, appear also in the opinion. It was urged that they had not presented their claim, duly authenticated, to the administrator of Coyle's estate. The administrator did not appeal from the judgment.

It was also urged that they had not presented their claim to the administrator of Cuthbertson's estate, against which they were not proceeding in this suit.

Since the case was last remanded, by amended answer, it was alleged, and evidence offered to sustain the allegations, that "the land sought to be subjected by plaintiffs to the payment of their judgment has long since been sold by an order of court, to which proceedings said plaintiffs were parties, and by said Watt purchased for the benefit of the estate of Cuthbertson, in order to secure a debt due by the estate of Coyle to Watt, as administrator, which purchase of said land by Watt was approved by this court, and on appeal such purchase was in all things affirmed; and in pursuance of said judgment, the said Downs, as administrator of Coyle's estate, made title to said land to Watt, as administrator. And the said land was by Watt, in pursuance of an order of court, sold and conveyed to one Henry Alston, who is in possession thereof."

The court excluded testimony offered to sustain this amendment, and this action of the court was assigned as error.

H. McKay, for appellants.

George L. Hill, for appellee.

Opinion of the court.

MOORE, ASSOCIATE JUSTICE.—The appellant claims the right to remove this cause to the Circuit Court of the United States, by virtue of the act of Congress of March 3, 1875. By the provisions of this act, a party desiring to remove a suit from a State court to the Circuit Court of the United States, should file a petition for its removal in the State court where the suit is pending, “before or at the term at which said cause could be first tried, and before the trial thereof.”

A reasonable construction of this statute, will not warrant the conclusion that a cause should be removed if an application for this purpose is made at any time before the trial of the cause is completed. It imports, on the contrary, as we think, that the party desiring to avail himself of the privilege of removing the suit, must make out and file his petition before the trial has begun. An application for a removal of the cause, which is not made until the court has commenced the trial, is not made, as is required by this statute, before its trial.

It appears from the bill of exceptions, that appellants’ petition for the removal of the case was not filed until after it had been regularly reached upon the docket, and called by the court for trial, and after the plaintiffs had announced ready, and while the court was awaiting the presentation of an application for its continuance by the defendant, for the preparation of which, time had, at his request, been given by the court.

We are of opinion that by this delay in making his application, appellant waived the privilege of removing the cause; that the trial was commenced when the plaintiffs were called upon and announced ready. Although commenced, the trial, it is true, might not be concluded at the term. It might be continued for cause shown by defendant, or on account of some ruling of the court on the pleading, or by the withdrawal of a juror after the evidence had been submitted to the jury, or through their failure to agree upon a verdict. And if the trial should be postponed after it had commenced, a mo-

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tion for removal might, if otherwise unobjectionable, be then entertained by the court. It would give an unfair advantage to the defendant, if he could first ascertain whether the plaintiff was ready, and if not, could force him into trial, while he would be neither bound to try or continue the case. Parties should not be allowed to speculate in this way with the court or their adversaries. And until a different construction shall have been given to this act by the courts of the United States, we shall hold that a motion made at the time this was, comes too late.

But if it was conceded that the trial of the case had not commenced when defendant's petition for its removal was filed, still the petition unquestionably was not presented "on or before the term at which the said cause could be first tried." The case was pending in the District Court of Harrison county for at least two terms before that at which defendant's petition was filed, at either of which, for aught that appears in the record, it might have been tried. By this delay in filing his petition, the defendant undoubtedly waived the privilege of removing the case to the Circuit Court of the United States under this act.

Most of the other questions presented by the assignment of errors were decided when this case was last before this court. And whether the rulings of this court on a first appeal should be regarded as *res adjudicata* on the case being brought here a second time or not, the negative of which seems to be intimated by our most eminent and lamented brother, who announced the judgment of the court on that occasion, we are clearly of the opinion that the points decided by the court at that time, which are decisive of the substantial matters in controversy between the parties interested in this controversy, are so abundantly sustained by reason and authority as to entirely relieve us from their further discussion, especially as counsel for appellant in his brief merely reiterates the assignments of error, without attempting to demonstrate the supposed error of the court by argument or authority.

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While certainly intending no reflection upon the able counsel by whom all the parties to this litigation have been represented with marked ability, and with a persistent zeal far beyond its merits, we can but think, as was said by Judge Gray, that the "complex, voluminous, and multifarious pleadings, interventions, and reconventions," "with numerous exceptions, exhibits, &c., repeated time and again in various forms," exhibited in the transcript of these consolidated suits, have greatly tended to confusion and to obscure the questions at issue, and to embarrass the court in determining the respective rights of the parties.

As was said by Mr. Justice Walker, when the case was before the Provisional Court, (33 Tex., 421,) this is a contest between creditors for a priority of lien on lands belonging to the estate of Coyle. Evidently the parties were mutually interested, and should have been made parties to any proceeding instituted by either of them to appropriate the land to the payment of the notes held by them respectively. If the elementary rule, that when a court of equity takes jurisdiction of a case, it will not determine it by piece-meal, but will dispose of the entire controversy, and will require all who are interested in it to be brought before the court, much of the difficulty and delay in the proper disposal of this litigation would have been avoided. But instead of presenting the facts, both appellant and appellees seem mutually desirous to conceal them. And it was not until after the decision of the case by the Provisional Court that there was an effort by either party to present their entire case or the facts upon which it properly turns.

On the case as then presented, the Provisional Court say that the original payee of the notes transferred one of them to White, Smith & Baldwin, and the other to Cuthbertson, appellee's intestate; that the former parties had other ample security for their entire debt; and as equity would not allow one creditor to accumulate unnecessary securities for himself to the prejudice of others, their lien upon the land should be post-

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poned to that of Cuthbertson's estate. And if the facts were as the court were led to suppose them, we are not prepared to say that their judgment was erroneous. But on the remand of the case, the facts were, as alleged in the amended pleadings of both parties, altogether different. And on these facts, this court held, as we think correctly, that Cuthbertson, by the assignment to the present appellees of the note which they hold as a security for an existing debt, and such future advances as they might make on the faith of it, intended to give them an effectual security; and if appellees failed to collect the note in the manner they were instructed by him, to proceed upon it, that they were intended to have, and were equitably entitled to, a preference over him to payment of their debt out of the property which stood as security for both notes.

It is urged by appellant that appellees had no right to a recovery against Coyle's estate, because their claim against it, by reason of the note transferred to them, had not been properly presented. To this, it is a sufficient answer to say, the executor of Coyle has not appealed. And as appellant has a decree for so much of the judgment in favor of appellees as is in excess of Cuthbertson's debt to them, he certainly has no cause to object to this judgment.

Nor can he complain that appellees failed to present the note executed to them by Cuthbertson, as a claim against his estate. They had possession and control of the Coyle note; and if they chose to rely upon making their money out of it instead of the estate of Cuthbertson, they were at liberty to do so. And if Cuthbertson's estate would have been benefited by paying appellees their debt and thereby get control of the Coyle note, it was appellant's duty to pay it, whether it had been presented as a claim against his estate or not.

While, as we have said, we are entirely satisfied with the rulings in the case when last here, we cannot altogether approve the judgment which has been rendered in the court below. The land upon which both parties were claiming a

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priority of lien, had been ordered to be sold by a judgment *in limine*, for the payment of appellants' claim, upon his giving bond for the payment, in due course of administration, of the amount of indebtedness of appellant's intestate to appellees, if a judgment should go in their favor on the final decision of the case. In the opinion of this court it is said: "In the view we have taken of the case, the injunction should have been reinstated on the final hearing, or else the parties to the refunding bond should have been adjudged to pay," &c. There was nothing, then, in the record showing that the land had been sold; and the suggestion with reference to the perpetuation of the injunction was evidently made on the hypothesis that the land might not have been sold. It is plainly inferable from the remainder of the sentence, which we have in part quoted, that if the land had been sold, appellees would have to look for payment to the security afforded by the bond given by appellant in obedience to the judgment of the court dissolving the injunction, or to appellant and the sureties on his bond as administrator, if it should be found that he had made an improper appropriation of the money collected by him from Coyle's estate by the sale of the land on the dissolution of the injunction.

Since the remand of the case, appellant, by an amendment of his pleading, alleges that the land had been sold by Coyle's executor; that it was purchased by him for Cuthbertson's estate, and had been subsequently sold, by order of the court, as the property of this estate; and on the trial, he offered evidence to establish the truth of this plea. This evidence, however, as appears from a bill of exception in the record, was excluded by the court; and notwithstanding the previous order for the sale of the land, which, so far as appears, has never been revoked, the court ordered a resale of the land by Coyle's executor, for the payment of the amount adjudged to be due on appellee's claim.

We cannot see how it can be said that the judgment of the court, dissolving appellee's injunction and ordering a sale

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of the land in satisfaction of appellant's judgment, can be said to be void. If it was merely erroneous, so long as it stood in force, whatever action was had under and in obedience to it, must be held valid and binding upon the parties and privies to the judgment by virtue of which it was made. It follows, that the judgment ordering a resale of the land by Coyle's executor, if in fact he had sold it under the previous judgment, is erroneous.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

ISAAC N. MARKS ET AL. v. D. HILL, ADMINISTRATOR, &c.

1. **LAND CERTIFICATE—CONSIDERATION FOR.**—Emigration and settlement in the State constituted the leading consideration of the grant of headright land certificates ; and where the head of a family died before its issuance, (or, as in this case, before the unconditional certificate had issued,) the certificate, no matter in whose name issued, would inure to the benefit of his estate.
2. **SAME—CONSTRUCTION OF STATUTE.**—Article 4178, Paschal's Dig., authorized the issuance of the unconditional certificate to the "widow's legal heirs, executors, or administrators," &c.: *Held*, That under this statute, the heirs, executors, and administrators alike stood as representatives of the deceased, and not in their own right.
3. **ADMINISTRATION—CLOSE OF, PRESUMED.**—An administration was granted in May, 1840, the record showing no extension of time and no action therein until 1851 : *Held*, That the presumption of law is that it was closed.
4. **YEAR'S SUPPORT FOR WIDOW AND CHILDREN.**—Prior to the probate act of 1848, no law of Texas authorized the setting aside of property at its appraised value for the support of the wife and children.
5. **RETROACTIVE LAWS.**—The probate act of 1848 did not confer on Probate Courts the right to allow the widow to select property of the estate for a year's allowance, which had not been made at the passage of the law.
6. **PROBATE COURTS.**—Probate courts have no power to dispose of property of an estate, except as it is conferred by the statutes.

Argument for the appellees.

7. SAME—VOID AND VOIDABLE.—An order was made by the Probate Court in 1851, in an administration originally granted May, 1840, and there was no evidence of its extension; personal property was set aside at its appraised value to the widow for a year's allowance for her support and that of her minor children: *Held*, Not merely irregular, but null and void.

APPEAL from Pánola. Tried below before the Hon. George Lane.

The facts are carefully given in the opinion.

J. G. Hazlewood for appellant, cited *Bartlett v. Cocke*, 15 Tex., 478; *Poor v. Boyce*, 12 Tex., 449; *Lynch v. Baxter*, 4 Tex., 445; *Finch v. Edmonson*, 9 Tex., 504; *Sydnor v. Roberts*, 13 Tex., 598; *Baker v. Coe*, 20 Tex., 436; *Lee v. Kingsbury*, 13 Tex., 68; *Tadlock v. Eccles*, 20 Tex., 782; *Giddings v. Steele*, 28 Tex., 733; *Paschal's Dig.*, art. 1260, and notes 462, 488; *Sayles's Probate Laws*, sec. 77, and note; *Green v. Crow*, 17 Tex., 188; 11 Tex., 249; *Wilkinson v. Wilkinson*, 20 Tex., 242; *Babb v. Carroll*, 21 Tex., 766; *Merriweather v. Kennard*, 41 Tex., 280; *Webb v. Webb*, 15 Tex., 276; *Johnson v. Newman*, 43 Tex., 636; *Randon v. Barton*, 4 Tex., 289.

A. M. Carter, for appellees.—The children of Daniel B. Lewis took by purchase and not by descent from Daniel B. Lewis. The conditional certificate issued under art. 4167, *Paschal's Dig.* The patent issued under art. 2186 *Hartley's Digest*.

The children of Daniel B. Lewis were his only heirs. (Arts. 576 and 577, *Hartley's Digest*.) At Daniel B. Lewis's death, there was nothing *in esse*, of which an administrator could take into account, or which could descend to his heirs. (*Walters v. Jewett*, 28 Tex., 192.) "The persons who have an estate of freehold subject to condition are seized, and may convey or devise the same, or transmit the inheritance to their heirs, though the estate will continue defeasible until the condition be performed, or destroyed, or released, or

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barred by the statute of limitations, or by estoppel." (4 Kent, 125.)

Daniel B. Lewis could not convey, (art. 4167, Paschal's Dig.) nor devise, nor transmit the inheritance to his heirs. In Ohio, in case of a grant to revolutionary officers or their legal representatives, where they are dead, the heirs will take as purchasers. (Thompson v. Gotham, 9 Ohio, 170.)

We think this case will reflect considerable light on the point of purchase. (See also 1 Bl'k Comm., Book 2, 241. A purchase is the method of acquiring an estate otherwise than by descent. (Ib.; also Williamson on Real Property, 96.)

We are strongly of opinion that the administration upon Daniel B. Lewis's estate was null and void. There were no debts due by the estate, and none owing to the estate, (see Mathews's testimony, Withers v. Patterson, 27 Tex., 491,) and nothing to administer upon. (Walters v. Jewett, 28 Tex., 128.)

GOULD, ASSOCIATE JUSTICE.—The appellees, who were the plaintiffs below, claimed the land in controversy by virtue of a conveyance from the children and sole heirs of Daniel B. Lewis. The appellants claimed the same land under the surviving widow of Daniel B. Lewis, and under an order of the County Court, made in the administration of the estate of said Lewis, setting the headright certificate aside to her.

The facts necessary to the proper understanding of the case are as follows: In 1839 Daniel B. Lewis, with his wife and two children, immigrated to Texas. In the same year, his wife died, and he married again. On January 10, 1840, a conditional certificate for 640 acres was issued to him, under the statute entitling him thereto. (Paschal's Dig., art. 4167.) In the spring of same year, he died, and letters of administration were granted in May, 1840, to James L. Mathews, brother of his second wife, Mary Ann. So far as the record shows, his estate consisted of personal property to the amount of \$63.75, and the conditional certificate. In August, 1842,

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this conditional certificate was located and survey made of 486 acres of land in what was then Harrison county, through whose agency does not appear. This survey, however, was in conflict with another, and was afterwards abandoned. In November, 1849, the unconditional 640 certificate was issued to Daniel B. Lewis, or the heirs of Daniel B. Lewis. The precise form of the certificate does not appear, nor by whose agency it was procured. In February, 1851, Mathews, as administrator, filed his petition, alleging that there remained in his hands the headright certificate of deceased for 640 acres of land, 480 acres of which had been located in Panola county, (cut off from Harrison county in 1846,) Texas. The petition states that he had filed his accounts, prayed for notice to the heirs, naming them, and that the estate be distributed. At the March Term of the County Court this petition was amended by leave of court, so as to show that the property on hand was simply a certificate for 640 acres of land. At the same term, the court made the following order: "Estate of Daniel B. Lewis. It appearing to the court that there never had been any order heretofore setting apart the property for the support and maintenance of the widow and heirs of said estate, and the said widow being willing to take the amount of property contained in the inventory at its appraisement, it is therefore ordered by the court that the same be set apart, to wit, one bed and furniture, valued at \$30; one saddle, \$5; one gun, \$20; pot ware, \$2.50; crockery ware, \$3.25; one trunk, \$3; Daniel B. Lewis's headright certificate, \$320; and that the administrator be and is hereby required to hand over the same to said widow, upon paying costs, &c., paid out by him in management of said estate." The order proceeds to recite the examination of the administrator's accounts, and that the entire estate had been set apart to the widow, and finally discharges the administrator. At the time this order was made, the second and surviving wife of Daniel B. Lewis was

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living with her third husband, R. G. Stollcop, she having first, after Lewis's death, married one Miller.

In September, 1851, the conditional certificate was surveyed on the land in controversy. In December of the same year, the widow, joined by her then husband, conveyed the certificates, conditional and unconditional, to S. Harris, and after several intermediate conveyances of the certificate and land surveyed thereby, these were conveyed in 1856 to the appellants.

In 1854, the sons of D. B. Lewis conveyed the certificate and the surveys made by virtue thereof to W. K. Elliott and J. E. Anderson, the latter of whom afterwards conveyed to T. S. Anderson, who, with the administrator of Elliott's estate, were the plaintiffs. In 1874, the land in controversy, corresponding in the field-notes with the survey of 1851, was patented to the heirs of D. B. Lewis.

It is contended on the part of appellees, that the unconditional certificate constituted no part of the estate of D. B. Lewis, but that it was the property of his heirs by purchase and not by descent. Such, however, is not our opinion. It is believed that the coterminous construction was, that immigration and settlement in the State was the leading consideration of the grant, and that where the death of the head of the family occurred before the lapse of the three years, during which he was required to remain a citizen of Texas, and where, as in this case, the wife at the time of immigration was previously dead, the unconditional certificate, no matter in whose name it issued, would inure to the benefit of his estate. When the heads of the family both died before the lapse of three years, the right to a certificate under the act of January 4, 1839, was incomplete. (Paschal's Dig., art. 4167.) But subsequent legislation authorized the issuance of the unconditional certificate to the "widows, legal heirs, executors, or administrators of any one entitled to the benefit of this law who died a citizen of the Republic." (Paschal's Dig., art. 4178.) It is believed that

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under this statute the heirs, executors, and administrators alike stood as the representatives of the deceased, and not in their own right. There is nothing in the subsequent act authorizing patents on such unconditional certificates inconsistent with this view. (Paschal's Dig., art. 4311, and art. 4228a.) The children of D. B. Lewis inherited whatever interest they had in their father's headright certificate, subject to any valid disposition thereof made by his administrator, under the orders of the County Court. But we are also of the opinion that the order of that Court setting the certificate aside to the surviving widow was unauthorized and void.

After the lapse of over ten years, without any action in the administration of this estate, it may well be held, that the administration was no longer open. This is not the case of a mere failure to enter an order extending an administration. So far as the record shows, the administrator had not been recognized as such by the court during the long interval of nearly eleven years. In the absence of some order, showing its existence, we think it would be going beyond any of the former cases, to recognize this as a valid, subsisting administration. (12 Tex., 449; 15 Tex., 557 and 606; 16 Tex., 413; 18 Tex., 81.) But, even if the administration were still open, we are of opinion that the order of the court was unauthorized. Under the laws in force at the time the administration was opened, and under the subsequent statutes, up to the probate law of 1848, the court had no authority to allow the widow to select property, at its appraised value, in payment of an allowance for a year's support of herself and minor children of deceased. That act of 1848 made it the duty of the chief justice, at the first term of court after the grant of letters, to "fix the amount of an allowance to be made for the support of the widow and minor children, if there be either or any, of the deceased, which allowance shall be of an amount sufficient for their maintenance for one year, and shall be paid by the executor or administrator to the widow,

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if there be one; if not, then to the guardian of the child or children, either in money, out of the first funds of the estate that may come to his hands, or in such personal effects of the deceased as such widow or guardian may choose to take at the appraisement, or a part thereof in each, as they may select." (Paschal's Dig., art. 1304.) The County Court had no authority to dispose of the property of an estate, except as it was conferred upon it by the statute. (*Withers v. Patterson*, 27 Tex., 495.) The power of the court to make the order which it did must be found, if at all, in the section of the statute just quoted. We are of opinion that this statute did not have an indefinite, retrospective operation, and did not confer upon the court power to authorize the widow to select property in payment of an allowance never fixed in amount, where the estate had been for a series of years in course of administration under laws which gave no such right, and which, at the time the administration was begun, made no provision even for an allowance. In our opinion, the action of the court was not merely irregular, but was an attempt to dispose of the estate in a manner not authorized by law, and was null and void.

Under the law in force at the death of Daniel B. Lewis, his children were his sole heirs, and became the legal owners of the land which was patented in the name of the heirs of D. B. Lewis. The plaintiffs produced a valid conveyance from these heirs, and were entitled to recover the land.

The judgment is affirmed.

AFFIRMED.

W. A. MURRAY v. T. J. BROUGHTON.

CHANGE OF VENUE.—In October, 1876, an order was made by the district judge in Kaufman county, to transfer a cause which the presiding judge was disqualified from trying, to the county of Van Zandt. The district clerk of Kaufman county refused to make out a tran-

Argument for the appellant.

script of the entries and decrees in the case, and to forward them, together with the original papers in the cause, to Van Zandt county, as required by the order. On appeal by the plaintiff from the judgment of the District Court, refusing to award a *mandamus* against the clerk to compel a transfer of the papers in the cause: *Held*—

1. That the disqualification of the district judge is not, under the present Constitution, a cause for a change of venue.

2. When a district judge is disqualified, a special judge must be provided, as required by the act of 1876, (General Laws, sec. 3, p. 141.)

3. The act of 1854, which provided for a change of venue when a district judge was disqualified, cannot be upheld as a law now in force by sec. 45, art. 3 of the Constitution of 1876, which provides that "the power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law, and the Legislature shall pass laws for that purpose;" that section, as well as that part of section 56 in the same article which prohibits a special law changing the venue in civil or criminal cases, is designed as a limitation on the legislative power, and to require that a change of venue shall be a judicial act under a general law prescribed for that purpose.

4. That the writ of *mandamus* was properly refused.

APPEAL from Van Zandt. Tried below before the Hon. M. H. Bonner.

J. J. Hill, for appellant, referred to the following provisions of our present and former Constitutions: Const. of 1845, arts. IV, VII, sec. 14, Paschal's Dig., 58, 64; Const. of 1866, arts. IV, VII, secs. 12, 14, Paschal's Dig., 936, 941; Const. of 1869, arts. V, XII, secs. 10, 11, Paschal's Dig., 1116, 1124; Const. of 1875, arts. III, V, secs. 11, 45; the act of February 13, 1854, (Paschal's Dig., art. 1417.)

A subsequent statute does not repeal, by implication, a former one, unless clearly repugnant to it. The same is true of a constitution as applied to former statutory law. A new constitution only abrogates statutes repugnant to it. This principle is enunciated in our present Constitution. (See Gen. Pro., sec. 48.) Such would be the effect of the adoption of a new constitution, independent of any declaration on the subject.

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Repeals by implication are not favored. The learning of the courts is against it. Such is the language of the courts and law writers on the subject.

Judge Story, in *Wood v. The United States*, 16 Pet., 362, a third of a century ago, laid down the correct rule, which has since been uniformly followed by the courts and law writers on the subject. He states the proposition thus: "There must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

He also cited Dwaris on Stat., 154, 155, note 5.

John J. Good and *J. G. Eblen*, for appellee.

ROBERTS, CHIEF JUSTICE.—This is a proceeding by *mandamus*, to compel the clerk of the District Court of Kaufman county to transmit the papers in a cause, upon an order changing the venue thereof to the county of Van Zandt.

The judge of the District Court, for the district in which the county of Kaufman is situated, being disqualified to try the case, from having been of counsel therein, upon motion of one of the parties, an order was made, and entered of record, by the District Court of Kaufman county, changing the venue of said case to the county of Van Zandt.

The question in this case is, was said order valid under the Constitution and laws of this State?

This is not an ordinary question of the change of venue, on account of the prejudice, or other cause specified in the law, for obtaining an impartial jury for the trial of a cause. It is a mode of obtaining a district judge to try the cause, when the regular incumbent is disqualified. It pertains to the organism of the State Government.

The Constitution of this State prescribes the modes of providing officers in the judicial department for all of the courts, generally by a popular election, and defines their powers and

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the limits of their jurisdiction, and also provides the means of obviating the inconvenience of their disqualification.

The district judge, under our present Constitution, is elected by the qualified voters of his district. In the event of his disqualification in any case, for the causes therein set forth, the modes are prescribed by which a substituted judge may be procured for the trial of the case in the county where the suit is pending, as follows to wit: "The parties may by consent appoint a proper person to try said cause, or upon their failing to do so, a competent person may be appointed to try the same, in the county where it is pending, in such manner as may be prescribed by the law. And the district judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so, when directed by law." (Section 11, art. V, Constitution 1876.)

It is to be noticed that in all of the modes herein provided, it is contemplated that the case is to be tried in the county where the suit is pending.

This is complete and exhaustive, in respect to the modes of substituting a district judge, in the event of a disqualification of the judge of the district, and supplants all other modes that were formerly provided in the Constitution of 1869 and in the law of 1854, one of which was by a change of venue. (Const., sec. 11, Art V; Paschal's Dig., p. 1116, art. 1417.)

There is another clause of the Constitution of 1876, which authorizes the Legislature to "provide for the holding of District Courts, when the judge thereof is absent, or is from any cause disabled or disqualified from presiding." (Sec. 7, Art. V.)

Under the power here conferred, the Legislature has passed a law, that when any district judge shall be absent from a court, or shall be unable to hold said court, there shall be no failure of the term on that account, and that a special judge may be chosen by the practicing lawyers there and then present. (Acts of 1876, p. 140, sec. 1.) The operation of this law may incidentally furnish a special judge for the term

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or part of it, competent to try a case in which the district judge is disqualified. And if so, it still contemplates that the case shall be tried in the county where it is pending. The same act goes further, and provides "That whenever any case is called, in which the district judge, or the special judge, chosen as hereinbefore provided, shall be a party, or have interest, or have been attorney or counsel, or otherwise disqualified from sitting in and trying the same, no change of venue shall be made necessary thereby; but the parties, or their counsel, shall have the right to select and agree upon an attorney of the court for the trial thereof." (Sec. 3, p. 141.)

This would seem to be conclusive, as a legislative construction, that the disqualification of the district judge in a particular case was no longer to be a ground for the change of venue. To carry out the same general object, the Legislature passed another law, permitting a case, whose venue had been changed by reason of the disqualification of the district judge, to be moved back, when the disqualification no longer exists. (Acts of 1876, sec. 1, p. 49.)

It may be contended that the law of 1854, providing for a change of venue in such case, may be upheld as a subsisting law, by another clause of the Constitution of 1876, which reads as follows, to wit: "The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law; and the Legislature shall pass laws for that purpose." (Sec. 45, Art. III.) This, as well as that part of section 56 in the same article, which prohibits a special law "changing the venue in civil or criminal cases," is designed as a limitation of the legislative power, and to require that a change of venue shall be a judicial act, under a general law prescribed for the purpose.

It is not to be deduced from this that it was intended to give to the Legislature the power to change the venue in a case because the district judge was disqualified to try it, when the Constitution in another part of it had provided the modes

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of obviating this inconvenience, in all of which it was provided that the trial should be in the county where the suit was pending, thereby negating any intention to make, or cause to be made, a change of venue, one of the modes of obviating it.

The judgment of the District Court refusing to grant a peremptory *mandamus*, is therefore affirmed.

AFFIRMED.

THE TEXAS & PACIFIC RAILWAY COMPANY v. JAMES MURPHY.

1. RAILWAY COMPANY—LIABILITY OF.—The Texas and Pacific Railway Company was liable for damages caused by the Southern Pacific Railway Company prior to the 21st of March, 1872, the date when the consolidation of said companies was effected in pursuance of legislative enactments.
2. RAILWAY COMPANY—NEGLIGENCE—PLEADING.—In a suit for damages against a railway company on account of the alleged negligence of its agents, it is not necessary that the petition should negative, either by facts stated or by direct averment, the existence of contributive negligence on the part of plaintiff; an exception to this rule exists when the petition, from its averments, would establish, if unexplained, a *prima facie* case of negligence of the party injured.
3. NEGLIGENCE.—Negligence, in one sense, is a quality dependent upon, and arising out of, the duties and relations of the parties concerned, and is as much a fact to be found by the jury, as the alleged acts to which it attaches by virtue of said duties and relations.
4. SAME.—In the absence of law defining the acts which constitute negligence, it is a fact to be found by the jury on evidence, and it is error to instruct a jury as to what acts constitute negligence when the law is silent as to such acts.
5. CHARGE OF COURT.—Article 1464, Paschal's Dig., is mandatory and peremptory. It leaves no discretion to the judge as to whether or not he shall "charge or comment on the weight of evidence," or as to whether or not he shall "submit questions of fact solely to the jury;" but in his charge, questions of law must be separated from

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questions of fact, and the latter be decided by the jury alone. The statute presumes that the jury is as competent to decide questions of fact as the judge is to determine questions of law.

6. **NEGLIGENCE—CHARGE OF COURT.**—Acts of negligence may be of a character so extreme and so clearly established by uncontradicted evidence, that this court would not on appeal disturb a verdict rendered on a charge, in which the court below had departed from the statute and instructed the jury that such acts constituted negligence; but in such case it must appear manifest that he who complains of the charge had not been injured by it.
7. **NEGLIGENCE—WHEN MATTER OF LAW—RAILWAY.**—When by statute a specific duty is imposed on a railway company in regard to the running and management of its train, a breach of such duty by which one receives personal injury, may be declared in a charge of the court as matter of law to be wrongful or negligent.

APPEAL from Harrison. Tried below before the Hon. M. D. Ector.

This suit was brought by James Murphy, to recover \$20,000 damages, alleged to be due on account of the negligence and gross misconduct of the conductor on a passenger train of the Southern Pacific Railroad Company. The petition alleged, that plaintiff had a ticket from Jonesville to Hallsville, on the company's line; that on the 26th day of May, 1871, he was waiting for the train at Jonesville when it arrived; that during its stoppage he was at a convenient distance from the train, waiting for the signal to be given to start; that when the signal was given, he proceeded to get on board at the usual entrance, but that the cars started at the same instant in which the signal was given, and in the attempt to get on board, he was violently thrown from the train by reason of the rapidity with which the train was moving, and his right arm falling on the iron rail, was cut off before he could remove it; that said injury was caused by the gross negligence and mismanagement of plaintiff in not stopping five minutes at Jonesville, as required by the statute. Amended petitions were filed, which are noticed in the opinion, in which a consolidation of the Texas and Pacific Railway Company with the Southern Pacific Company is alleged.

Argument for the appellant.

The answer of the company consisted of a general denial, and, by amendment, it was alleged that defendant was not a passenger; that he was drunk, and attempted to get on the train when it was in motion, and while another was in the gangway, with whom he was struggling when he fell; that his injury was not caused by the negligence of the company's agents; that the train did not leave the station until after the usual signal, and that plaintiff had paid nothing as a passenger.

The jury returned a verdict for \$7,000 against the company, for which judgment was rendered. The charge of the court is too lengthy for insertion, but those parts of it to which the opinion chiefly refers are sufficiently indicated by the opinion itself.

Stedman and *Sexton*, for appellant, contended—

1. That not a case can be found, where, upon a sale by one corporation to another, the purchaser has been held bound to answer in unliquidated damages for the torts of the vendor.

2. On the proposition that a passenger who attempts to get on a moving train of cars is guilty of contributory negligence, they cited *Garrett v. Manchester and Lawrence R. R. Co.*, 16 Gray, 501; 55 Ill., 379; and *Phillips v. The Rennselaer and Saratoga R. Co.*, 49 N. Y., 177.

3. On the proposition that it was the duty of the court below to instruct the jury what facts would constitute contributory negligence, they cited *R. R. Co. v. Aspel*, 23 Penn., 145; *Van Schaick v. Hudson River R. R. Co.*, 43 N. Y., 530; *Garrett v. Manchester and Lawrence R. R. Co.*, 16 Gray, 501; 53 Penn., 250; *Deyo v. New York Central R. R. Co.*, 34 N. Y., 9; 24 Vt., 487; and 11 Minn., 296.

They also referred, on the question of negligence generally, to 6 Coldwell, (Tenn.) 45; 2 Bosworth, (N. Y.) 374; 43 Mo., 405; 9 Wis., 202; 21 Wis., 372; 44 Miss., 466; 23 La. An., 264, 462, 492; 3 Vroom, (N. J.) 88; 26 Ind., 228; 4 Bush, (Ky.) 593; 40 Miss., 374.

Argument for the appellee.

George L. Hill, for appellee.

I. Where two companies are consolidated into one, the new company is liable to pay all the debts and obligations of both companies existing before the consolidation. See cases cited in Lacey's Digest of Railway Decisions, page 134, secs. 347-8, and page 135, secs. 24, 25. (*I. B. & W. R. Co. v. Carr*, 35 Indiana; *Prouty v. L. S. & M. R. Co.*, 52 N. Y.; *C. C. & I. C. R. Co. v. Powell*, Administrator, 40 Indiana; *Stevenson v. S. P. R. R. Co.*, decided by this court, at Tyler, October, 1874.

II. The defendant was guilty of violation of law and of gross negligence in the management of the train, 1st, in not stopping at Jonesville station five minutes, (see Paschal's Dig., art. 6532, act of November 6th, 1866;) 2d, in not giving notice of intended departure, by the usual signal. It cannot be imputed to plaintiff as negligence that he did not anticipate culpable negligence on the part of defendant. He had a right to presume that the defendant would obey the law, and exercise all proper care and diligence, and act on that belief. (*Shearman & Redfield on Negligence*, sec. 31; *P. and T. R. Co. v. Hagan*, 47 Penn., 244; *Beisiegel v. N. Y. C. R. R. Co.*, 34 N. Y., 622; *Penn. R. R. Co. v. Ogier*, 35 Penn., 60; *Ernst v. H. R. R. Co.*, 35 N. Y., 9.)

III. Contributory negligence is a question for the jury, being one of fact. (*Beisiegel v. N. Y. C. R. R.*, 34 N. Y., 622; *Johnson v. H. R. R. Co.*, 20 N. Y., 66; *Phila. and T. R. Co. v. Hagan*, 47 Penn., 244; *Feler v. N. Y. R. R. Co.*, 49 N. Y., 47; *Ernst v. H. R. R. Co.*, 35 N. Y., 38.)

IV. An attempt to get upon a train in motion is necessarily negligence. (*Shearman & Redfield on Negligence*, sec. 282; *Evansville and C. R. Co. v. Duncan*, 28 Ind., 441.)

V. Where a party by the wrongful act of another has been placed in circumstances calling for an election between leaving or boarding a train in motion, or submitting to an inconvenience and a further wrong, the defendant cannot avoid the consequences of its own wrong by charging negli-

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gence on the plaintiff. (*Filer v. N. Y. C. R. R. Co.*, 49 N. Y., 47; *Penn. R. R. Co. v. Kilgore*, 32 Penn., 292; *Foy v. London B. and S. C. R. R. Co.*, 18 C. B. R., N. S., 225; *Siner v. G. W. R. Co.*, L. B., 3 Exch., 150; *Penn. R. Co. v. Ogier*, 35 Penn., 60; *Biesiegel v. N. Y. C. R. R. Co.*, 34 N. Y., 622; *Fero v. B. S. L. R. R. Co.*, 22 N. Y., 213; *Johnson v. W. C. and P. R. R. Co.*, 70 Penn., 357.)

ROBERTS, CHIEF JUSTICE.—The appellee brought a suit in 1871 against the Southern Pacific Railroad Company, for damages, for an injury to his person by the negligence and misconduct of the conductor of one of its trains, in running the same upon the road; and during the pendency of the suit, alleged in an amended petition, that the Southern Pacific Railroad Company and the Texas and Pacific Railway Company had been consolidated, and that said latter company was liable for the said damages. It was proved on the trial by Hall, who had been vice president of the former company, that the consolidation took place on the 21st of March, 1872. Appellee also alleged and read in evidence the several acts of the Legislature of the State of Texas, in relation to said consolidation of the two companies.

The appellant excepted to the petition, because the Texas and Pacific Railway Company was not liable for such damages so incurred, which was overruled.

The same question was raised by a charge, asked by the appellant, and refused by the court, upon the trial of the cause.

So far as anything appears in the pleadings of the parties and in the evidence upon the trial, we are of opinion that the court did not err.

The correctness of his rulings is deducible substantially from the decision of this court, in reference to the effect of said consolidation, in the case of *Stephenson v. Texas and Pacific Railway Company*, 42 Tex., 162.

Appellant contends that the petition is defective, in not

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having averred that the injury was inflicted upon him without any fault on his part in the transaction.

The petition, so far as it is necessary to be stated on this subject, alleged that appellee had procured a ticket as a passenger; was waiting at the Jonesville station; was at a convenient distance from the cars, where they had stopped, awaiting the signal to be given by the conductor; said conductor neglectfully, and in utter disregard of the convenience and safety of the passengers traveling and wishing to travel on said train, gave the said signal of departure, and at the same instant of giving said signal, caused said train to move, and your petitioner, immediately upon the giving of said signal, proceeded to get aboard of said train, by the means and at the usual entrance of the cars of said train, and your petitioner, in attempting to get aboard of said train as aforesaid, was thrown from said train "by reason of the great rapidity with which the said train was then moving," and fell with his arm upon the rail of the track; and before he could remove it, it was run over and cut nearly off by the wheel of the car, so that it had to be amputated. It is further alleged, that the defendant, by the negligence and gross misconduct of said conductor of said train, crippled and maimed the petitioner by the loss of his hand and arm, as aforesaid, to his damage twenty thousand dollars.

The petition is amended by stating that the train was not stopped at said station five minutes, as was the duty of the conductor to do; and if it had been, he would have had time to get on the train without injury.

Again, by amendment, it is alleged that petitioner "was standing in about thirty feet of said station, where the said train stopped; that he started to said train, with the view of going aboard of the same, and that the said train moved off without giving any signal before starting; that he got to said train as soon as possible, and in endeavoring to get aboard of same as aforesaid was thrown from said train

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by reason of the movement of the same, and was injured as set out in the original petition.”

The negligence of the defendant, by which the injury upon plaintiff was produced, is repeated in the several amendments to the petition.

The petition sufficiently alleges that, by the negligence of the defendant, the injury was produced which entitled him to recover damages for it. Inasmuch as the petition does not aver that he, in doing as he did, was not guilty of negligence, the question upon this point is, do the facts as stated in the petition show that he also was guilty of negligence in the effort to get upon the car under the circumstances stated in the petition. If so, he makes the defense of contributive negligence for the defendant in stating his own case. We must infer, from what is stated, that the car was moving, or in the act of moving, when he reached it and made the attempt to get in it. If moving, how fast, at that time, is not stated, nor the time that elapsed while he was making the effort, but only that when he was thrown from the car it was “by the great rapidity with which it was then moving.” It may be understood that the signal was an invitation to the passengers to get on, as he alleges; he was waiting for the signal to get on the train, or a signal for departure literally, upon the supposition that the passengers had time to get on the train. Under either interpretation, we cannot hold that the act of endeavoring to get on the train, at the time and under the circumstances stated, was necessarily an act of contributive negligence. We are referred to a case, wherein it is held that the petition must negative, either by the facts stated or by direct averment, the existence of contributive negligence. (*E. & C. Railroad v. Dexter*, 24 Ind., 413.)

It is believed that such ruling has originated from the following cases, where the facts appeared in the petition, which established, *prima facie* at least, the negligence or fault of the

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party injured: E. & C. R. R. Co. v. Hiatt, 17 Ind. R., 102; 13 Ind., 135.

Suppose, for instance, it is alleged that a person, while on the defendant's track, is injured by the running of the cars upon the track; *prima facie*, he shows himself to be where he ought not to be when the train is running there, and in that case he should state such circumstances or make such averments as would justify or excuse the fact of his being then on the track, in the way of the cars. (Ib.; and see original case, Presdt. & T. of T. Mt. Vernon v. Dusonschitt, 2 Carter, Ind., 586.)

It is often stated that the plaintiff must show that the injury was caused by the negligence of the defendant, without any fault or negligence on his part. It would be more correct, it is thought, to say that the plaintiff must show that the injury of which he complains was produced by the negligent acts of the defendant, under such circumstances as did not develop any negligence on his part, contributing to his injury. In the absence of proof, his negligence would not be presumed. (Button v. The H. River R. R. Co., 18 N. Y., 259; Redfield on Carriers, &c., sec. 370, and note 20, referring to 27 Vt., 62, 37 Vt., 501.)

The case of a party's own negligence, concurring with that of the defendant in producing an injury, is merely an exception to the general rule, that he can recover for any injury inflicted on him by the negligent acts of the defendant. (Chapman v. New Haven R. R. Co., 19 N. Y., 342.) Though it would be the safer practice, plaintiff is not bound to allege the non-existence of an exception that may or may not exist as a defense to his action. It is said to be an exception, and is so only, because its existence negatives the existence of the fact that the injury was caused by the negligence of defendant. The charge of the court was objected to.

There were some facts established with reasonable certainty, to wit, that the train was moving and had gone about a car's length when plaintiff got to it and reached up to get

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on; that it started with a jerk, and increased its speed rapidly after starting; that plaintiff went along with the car, holding to the railing, trying to get up, and was thrown from the car in crossing a ditch, about fifty or sixty feet from the place where he reached the car; that a man (by the name of Shed) ran before him, and got up at the entrance, and reached back, and tried to help the plaintiff get up; and that the bell was ringing just after the train started, being certainly heard after the jerk in starting. A pass-ticket was found on the person of plaintiff after he was hurt.

The court charged the jury, in effect, that the defendant was guilty of negligence in the management of the train, if the conductor, after stopping a very short space of time, gave the signal of departure, and, at the same instant of giving said signal, caused the train to move, and plaintiff was injured by the force and moving of the train while he was attempting to get in the car. From this it is evident, that the judge regarded the signal stated in the petition and spoken of by the witnesses, as an invitation to passengers to get into the cars, and the wrong done was in not giving time afterwards for them to do so before moving the train.

In defining the rules of law applicable to contributive negligence, the court presented three distinct combinations of fact, having reference to the speed at which the train was running when the plaintiff reached it and made the attempt to get on; that is, that it would be contributive negligence, if the plaintiff attempted to get on when it was running rapidly; it would not, if the train had begun to move slowly; but if the train had begun to move, and after it had started to leave said station, and when it was under way, and plaintiff was not induced to get on the train by the invitation or conduct of the managers of the train, then it was a question for the jury to determine, whether his attempting to get on the train was culpable negligence or not.

The court determined, as matter of law, that the fact of starting the train instantly, upon giving the signal of depart-

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ure, was an act of negligence or misconduct on the part of defendant, and that the act of attempting to get on a train, moving rapidly, was negligence on the part of plaintiff; but, if the train was moving slowly, it would not be an act of negligence on the part of plaintiff.

The issues before the jury, arising upon the pleadings and evidence, were: First. Had the plaintiff proved, to their satisfaction, the facts alleged in the petition to have been done by the defendant? Second. Had the plaintiff shown that such acts, so done, amounted to a breach of duty, or wrong to the plaintiff, so as to make them negligent or wrongful? And, third. Had the plaintiff shown that such neglectful or wrongful acts caused the injury alleged? The answer of the jury to these questions, by a general verdict, is yes or no. Now, can the court tell the jury that the plaintiff has proved, by certain witnesses, satisfactorily, that the cars were moving slowly, when plaintiff reached them to get on, and that they were started at the instant of giving the signal for departure? This the court did not do, because it would be assuming to direct the jury as to what conclusion they should arrive at as to the weight of the evidence before them. Can the court, with any better reason, tell the jury that such acts, if established, constituted a breach of duty, or wrong to plaintiff, on the part of defendant? This the court did charge, in substance, and, in doing so, assumed to know, and declare as matter of law, that moving the train at the instant of giving the signal of departure was a breach of duty, or a wrongful or negligent act, on the part of the defendant. But it does more. It assumes to be a matter of law, that the act of attempting to get on the train, moving slowly, under such circumstances, would not be an act of contributive negligence on the part of the plaintiff. This charge decided for the jury the whole of the facts of negligence against the defendant, in the management of the train, and in the effort of plaintiff to get on it, if they should be satisfied, from the evi-

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dence, that the other facts were established as stated in the charge.

Negligence, in one sense, is a quality, attaching to acts dependent upon, and arising out of, the duties and relations of the parties concerned, and is as much a fact to be found by the jury, as the alleged acts to which it attaches, by virtue of such duties and relations. If a law can be found which declares, that it is the duty of the conductor of a train to give a signal of departure, and then wait a reasonable time for passengers to get into the cars before moving the train, the court can declare, as matter of law, that the simultaneous giving the signal and moving the train is an act of negligence, in reference to one who sustains the relation of a passenger, who has not been allowed a reasonable time, after the signal is given, to get upon the train. So, too, if a law can be found which declares, that it shall not be deemed an act of negligence to attempt to get upon a train, while moving slowly, if it has been started at the same time the signal of departure is given, the court may so tell the jury; and, in their finding of the acts to which such legal consequences attach, they will also find the fact of negligence in the one case, and the absence of it in the other. In the absence of any such law, defining the acts which constitute negligence, it is fact to be found by the jury, upon evidence, as any other material fact.

This will suffice to indicate the exact point to be considered in this opinion.

We are of opinion that the charge of the court is erroneous, in instructing the jury as if such laws did exist as applicable to this case, and in thereby relieving the jury from finding the fact of negligence, both as to plaintiff and as to defendant, in the matters mentioned, relating to each one respectively.

It has long been the settled policy of the laws of this State, to keep separate and distinct, and to define accurately, the respective functions of the judge and of the jury in the trial

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of cases, both civil and criminal. As early as 1853, the Legislature, in pursuance of this policy, enacted a law, that is still in force, which indicates a radical departure from the mode of proceeding in trials, as practiced in the courts of England and of many if not most of the American States, wherein the common law prevails. It is as follows: The judge "shall not in any case, civil or criminal, charge or comment on the weight of evidence. He shall so frame his charge as to submit questions of fact solely to the decision of the jury, deciding on and instructing them as to the law arising on the facts, distinctly separating the questions of law from questions of fact. He shall not charge or instruct the jury in any case, unless the charge shall have been by him first reduced to writing and signed, and every such charge shall be given in the precise words in which it shall have been written." (Pascal's Dig., art. 1464.) This is mandatory and peremptory. It leaves no discretion to the judge, as to whether or not he shall "charge or comment on the weight of evidence," or as to whether or not he shall "submit questions of fact solely to the jury." It is a positive direction to a judge as to what he shall do in the trial of a case in his court, however different may be the mode of trying cases in the courts of other countries, of which he may be informed by law-writers or by precedents. This is our system of procedure. The judge is forbidden by law either to aid a jury, or to infringe upon their province in weighing the evidence or in deciding upon the facts, in every case submitted to them. It presupposes that the jury is as competent to find the facts as the judge is to declare the law. This admits of no exception, so far as his duty, enjoined by law, is concerned, whether the facts are plainly established by the evidence, for one side or the other, or are complicated or doubtful. It has been held by this court that the District Court had no right to order a nonsuit in any case for want of sufficient evidence.

A demurrer to evidence, though it has been sanctioned, may be said to be almost obsolete in our practice. The

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judge's power to control the result of a case, in reference to the facts, is upon a motion for a new trial, when the proper objection to the verdict of the jury is made for that purpose.

Notwithstanding this policy of the law, so rigidly enjoined, it does not follow that every departure from the prescribed rule will authorize this court to reverse the case in which it occurs. It would be an error of law; but to require a reversal in this court, it must be a material error, to the prejudice of the party complaining of it. A case may be made out so plainly on one side, or may be so clearly defective in the evidence to sustain it, that although the court directed the jury to find a verdict, and how to find it, it would not be a material error, to the prejudice of the party cast in the suit, for which this court would be required to reverse the judgment on that account. (*Lea v. Hernandez*, 10 Tex., 137.)

So in a case like the present, the acts of negligence on the part of the plaintiff or defendant might be of a character so extreme, and so indisputably established by uncontroverted evidence, direct, and not conflicting, that if the court departed from the prescribed rule, in telling the jury that such acts amounted to negligence, it might be that this court could determine that such a charge had not been prejudicial to the rights of the party complaining of it, which would certainly be necessary to sustain such a charge.

Ch. J. Cooley, in a very able and searching review of the cases upon the subject of contributive negligence, says that "negligence consists in a want of that reasonable care which would be exercised by a person of ordinary prudence, under all existing circumstances, in view of the probable danger of injury."

"As a general rule, it cannot be doubted that the question of negligence is a question of fact, and not of law." And while admitting that there are plain cases, in which it has been held that the judge may rightfully instruct the jury, as matter of law, that the action cannot be maintained, he says: "The case, however, must be a very clear one, which would justify

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the court in taking upon itself this responsibility." "But while there is any uncertainty, it remains a matter of fact for the consideration of the jury."

The court, in taking this responsibility, must assume to be the judge of the proper standard of ordinary prudence, which would likely be different with different judges; and each judge would make his standard of prudence the law of the case, and thereby the law would change with a change of judges, who might be called upon to administer it. It is only necessary to examine the numerous reported cases to see the different opinions of different judges upon the subject. In Massachusetts, for instance, it is held, as matter of law, that the attempt to get on a moving train is *prima facie* contributive negligence. (Harvey v. E. R. Co., 116 Mass., 269.)

In Pennsylvania, in a similar case, the court below charged the jury, that "if the train was distinctly running on the track when the plaintiff attempted to enter, he was guilty of negligence, and cannot recover." It was held to be error; and the Supreme Court said, "it was for the jury to say whether the danger of boarding the train, when in motion, was so apparent as to make it the duty of the passenger to desist from the attempt." (Johnson v. The W. C. & P. R. R. Co., 70 Penn., 357.)

The same diversity of opinion may be found to prevail upon nearly ever fact relating to the subject of negligence, in the different courts of the different States of the Union. It must be considered also that no two cases ever came into court with exactly the same combination of circumstances, and that every new case must present some shade of difference from every other, in its facts. Must we now, in the inception of our adjudications upon this subject, start out in the search through the thousands of reported cases, to find the opinions of judges, as to the common and ordinary standard of prudence, in reference to every act, and every combination of acts relating to negligence, or shall we follow the plain command of our own statute, by submitting to the decision of

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the jury, as the sole judges thereof, the fact of negligence as well as all other facts in every case? This question is easily answered.

By our general laws, relating to railroads, certain duties are imposed upon companies running passenger and freight trains upon their roads, such as posting up signs where common roads cross the track, badges worn by certain officers, giving notice of time of running cars, receiving and transporting passengers and freight, when presented a reasonable time previous to starting from the stations, ringing a bell or blowing a whistle in passing roads and streets, providing brakes and careful brakemen, stopping at the stations five minutes, the breach of which duties so prescribed, may be declared, as matter of law, to be wrongful or negligent, when the acts constituting the breach of duty may affect any one injuriously. Railroad companies may also make reasonable regulations of their own for the management and running of their trains, or they may follow general customs in such management and running; which, when established, known, and acted on by the public, may impose upon the companies duties in reference to others, a breach of which, to their injury, might render such companies liable to damages. The facts involved in such regulations and customs, upon which duties would arise, not being matters known to the court, would have to be proved as other facts, where a breach of such duties might become the subject-matter of a suit for damages.

It is presumed that in this case the company had some regulation, or was governed uniformly by some custom in the mode of receiving passengers, and in stopping and in starting their trains, in reference to that purpose. Whether it was regulated by the length of time during which the trains stopped, or by ringing a bell or by blowing a whistle, or by a vocal announcement, is not shown in the evidence. The object of ringing the bell, as spoken of by the witnesses, was not explained. Nor was it shown whether or not it was customary for ordinarily prudent men to attempt to get upon

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the train while it was moving; nor under what state of circumstances it would be an act of imprudence to attempt it. With such evidence before the jury, they might have been properly able to decide the facts of negligence, both of the company and of the plaintiff, as it was certainly their province to have done in this case.

Believing the charge to have been materially erroneous, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

While I do not approve of all of the views expressed by the Chief Justice in his opinion in this case, I fully concur in his conclusion, and agree that the judgment should be reversed.

GEORGE F. MOORE,
Associate Justice.

ABE. MAYER v. O. F. RAMSEY.

1. ESTOPPEL.—If one acts in such a manner as intentionally to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he would otherwise not have done, the party whose conduct thus induces the act, will be restrained from asserting his right, unless it be such a case as will admit of compensation in damages; and this is not changed by the fact that the party against whom the estoppel is claimed acted with a knowledge of the facts, but under a mistake of his legal rights.
2. EQUITABLE ESTOPPEL—PRACTICE.—An equitable estoppel may be proven under a plea “not guilty,” in trespass to try title.
3. APPROVED.—Burleson v. Burleson, 28 Tex., 416; Page v. Arnim, 29 Tex.; Johnson v. Byler, 39 Tex., 610.

APPEAL from Panola. Tried below before the Hon. George Lane.

Suit brought by A. Mayer, the appellant, against Ramsey, in trespass to try title. Ramsey answered “not guilty,” and

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twelve months' occupancy of the land in good faith, and that he had made permanent and valuable improvements.

It was agreed on the trial, that both parties derived title from a common source—one G. G. Soap; appellant read in evidence a deed from Soap to M. Mayer, dated August 3d, 1862, and a deed from M. Mayer to himself, for the land in controversy, dated August 5, 1862. Appellant then closed.

Appellee read in evidence a judgment of the District Court of Panola County, in favor of I. D. Moorers, and against E. C. DeLoach and G. G. Soap, for \$251.75, which was rendered on the 25th June, 1860, and an execution thereon issued February 4, 1861, after an agreed stay of execution, which was returned "no property found." Appellee then, after proving that G. G. Soap was dead, read in evidence the petition of B. B. Lacy for letters of administration, with the order for his appointment, &c., as administrator of the estate of G. G. Soap, at the November Term, 1869.

At the March Term, 1870, of the County Court of Panola county, I. D. Moorers filed his petition for the sale of the land to satisfy his judgment. The order was made, and at the February Term, 1871, a report was made that I. D. Moorers had become the purchaser, and the sale was confirmed.

The deed from Lacy, as administrator, and to I. D. Moorers, was executed on the 20th of April, 1872, and on the same day Moorers conveyed to Ramsey, the appellee.

The appellee was introduced as a witness, and testified that in 1869 he stopped on his return home from Navarro county, in Henderson, for the sole purpose of seeing the appellant about buying the land in controversy; that Mayer then told him that the land was sold, to which Ramsey replied that he thought not; that at least he had not heard of it; that Mayer then told Ramsey that the land had been sold on the first Tuesday in that month, (December,) to satisfy a judgment lien which I. D. Moorers held against the land to secure a debt due from G. G. Soap and E. C. DeLoach; that Moorers had satisfied him (Mayer) that if he did not come and settle that

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judgment that the land would certainly be sold; Ramsey then asked Mayer what the amount of the judgment was, and was informed by him that it was two hundred and fifty dollars; Ramsey then asked Mayer why he did not pay it, for the land was worth more than that, and was answered by him that he could manage the money, and could not manage the land; he must therefore let the land go, and would have no more to do with it. Ramsey further testified that he bought the land from I. D. Moorer, in October or November, 1870, and in September, 1871; that Mayer came to his house to request a compromise, and asked him if he would take certain notes which he, Mayer, held against the judgment lien as collateral security, and surrender the land to Mayer. Ramsey answered that he had no compromise to make; that he had no deed to the land yet; that he had only I. D. Moorer's bond for title, and told plaintiff to go to Moorer; that plaintiff then remarked, that a poor compromise was better than a rich law suit. The evidence showed that Ramsey paid about \$400 on the land before this suit was brought, and had made improvements valued at from \$250 to \$300. G. G. Soap and his family lived on the land in 1860.

The court, among other charges not necessary to notice, charged the jury that if Ramsey made the purchase fairly, induced thereto on account of the disclaimer of Mayer to ownership of the land, or if said Ramsey made such purchase from Moorer at the instance of Mayer, or on his representing Moorer as the person who had the right to the land, or that Mayer had no claim to the land, then they should find for defendant Ramsey.

Verdict and judgment for Ramsey, from which Mayer appealed, assigning, among other alleged errors, error in the said charge.

Booty & Baker, for appellant.—Evidence establishing an estoppel *in pais* cannot be introduced in absence of plea setting it up when objected to. An estoppel is an equity that

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must be specially pleaded, and cannot be proved under the plea of not guilty. (*Ayres v. Duprey*, 27 Tex., 604.)

The evidence of Ramsey does not establish an estoppel. (*Burleson v. Burleson*, 28 Tex., 415; *Love v. Barber*, 17 Tex., 318.) Mayer's deeds were on record; had been since Ramsey lived in Panola county; was familiar with the facts; Mayer lived in Rusk county; had received message from Moorer. Ramsey knew then, or might have known, and it was his duty to know, all about Moorer's title or claim. Ramsey knew that appellant did not know of it. Appellant only declined to do anything when Ramsey called on him in Henderson, because he did not know the condition of Moorer's title. But Ramsey says that appellant afterwards called on him for a compromise, and even then Ramsey had neither paid for the land or acquired a deed from Moorer. So Ramsey was then certainly notified that appellant had not surrendered his title; appellee had done nothing by which he would have been damaged in refusing to take Moorer's title. The whole of Ramsey's evidence on the subject of estoppel shows that appellant did not intentionally mislead him, or commit or attempt to commit a fraud on him, nor did he mislead him or do or say anything that should have had a tendency to mislead him, as Ramsey was better informed than appellant, or might have fully informed himself; for appellee had notice of appellant's title, and full knowledge of the title he was getting from Moorer. The appellee does not say he was influenced by appellant to purchase of Moorer. (*Fowler v. Stoneum*, 11 Tex., 478.)

Drury Field, for appellee.

J. G. Hazlewood, also for appellee.

GOULD, ASSOCIATE JUSTICE.—Under the charge of the court, the defendant was only entitled to a verdict in case the jury believed that he had established the fact that he was induced to buy by the disclaimer of plaintiff when applied to, to sell

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the land, and his representations then made, that he did not claim the land, but that Moorer was the person to apply to. The charge, in fact, was, that the plaintiff showed in himself the legal title, and, assuming the invalidity of defendant's title, submitted to the jury only the defense of estoppel. If that defense was sufficiently established, it is unnecessary to examine questions bearing only on the legal sufficiency of defendant's title.

We think that the evidence of defendant, taken as true, justified the jury in finding that he was induced to buy the land of Moorer by the disclaimer of plaintiff; that the disclaimer was made under circumstances which justified the defendant in acting upon it, and that the defendant would be prejudiced if the plaintiff were allowed to set up against him the title which he had, with knowledge of the facts, deliberately disclaimed.

The doctrine of equitable estoppel is thus stated in the opinion in the case of *Burleson v. Burleson*, 28 Tex., 416, quoting from the opinion of Justice Pearson: "If one acts in such a manner as intentionally to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he would otherwise not have done, the fraudulent party will be restrained from asserting his right, unless it be such a case as will admit of compensation in damages." (See *Bigelow on Estoppel*, 600; *Love v. Barber*, 17 Tex., 317; *Williams v. Chandler*, 25 Tex., 11; *Scoby v. Sweatt*, 28 Tex., 714; *Page v. Arnim*, 29 Tex., 53.)

If Mayer acted with knowledge of the facts, but under a mistake as to his legal rights, he, and not Ramsey, should suffer from the mistake. (*Storrs v. Barker*, 6 Johns. Chan., 166.) And if at the time when Mayer again determined to assert his rights, Ramsey had not yet paid for the land for which he had contracted, (as to which the evidence is not clear,) whatever equitable rights, if any, Mayer may have had, as against Moorer, to the unpaid purchase-money, he was none the less estopped from disputing Ramsey's title. No question

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is presented by the assignments of error, as to the amount or character of the evidence, necessary to establish an estoppel.

It is contended, and the point was reserved by bill of exceptions, that the defense of equitable estoppel should have been specially pleaded, and that it was error to admit evidence to establish it under the plea of not guilty. The practice of allowing equitable defenses of this character to be set up in this way, is believed to have generally prevailed in the courts of this State, has been recognized by this court, and it is too late now to question its propriety. (*Johnson v. Byler*, 38 Tex., 610.)

If the plaintiff was taken by surprise by the introduction of evidence of estoppel, he failed to set it up in his motion for a new trial.

We see no error in the proceedings of the court below, and the judgment is affirmed.

AFFIRMED.

SUPREME COURT OF TEXAS.

GALVESTON TERM, 1877.

JOHN S. SELLERS v. E. J. REED ET AL.

1. CONSTRUCTION OF DEED—BOUNDARY.—Two deeds executed at the same time, by the same vendor, each calling for the line of the other as a division line, and calling for land within, but on opposite sides of the same survey, will be held to convey the entire tract, whether it be greater or less in quantity than estimated.
2. PARTITION OF EXCESS IN QUANTITY.—Such excess must be divided between the two in proportion to the quantity owned by each, irrespective of values, in the absence of facts showing that equity would require the application of a different rule.
3. SAME.—The price paid by the parties is not the measure by which the excess should be apportioned.

APPEAL from Fayette. Tried below before the Hon. I. B. McFarland.

The Patrick Allison quarter-league grant in Fayette county contained an excess of $74\frac{4}{9}$ acres. October 14, 1844, Robert W. Henry and Alfred Moore, then owning the Patrick Allison one-fourth-league grant, sold to Mary Wilson 700 acres off the northern part of said tract, leaving 411 acres off said quarter of a league, and bounded on the south by a line running east and west, separating the two tracts. At the same time, they sold to Samuel T. Cobb 411 acres, being the remaining amount of 411 acres on the southern half of said survey, and bounded on the north by a line running east and west, separating said tract from the 700-acres tract sold to Wilson.

Mrs. Wilson sold, and by regular conveyances, the 700-acres tract passed to John S. Sellers, and the 411-acres tract was conveyed to E. J. Reed.

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March 2, 1871, Sellers brought trespass to try title against Reed and his tenant, J. E. Smith, for the excess, then supposed to be 49 acres. By amendment, partition was asked, and the excess, on return of a surveyor to an order of survey, was found to be $74\frac{4}{9}$ acres.

Defendant Reed pleaded not guilty, and also set up claim to the excess, alleging that Sellers had 15 acres in possession, for which defendant asked judgment.

Plaintiff alleged that the purchase-money from Wilson to Henry and Moore was \$1,500, and from Cobb was \$500, and asked partition of the excess on that basis.

On the trial, the court decided that the excess belonged to neither party, and gave judgment against plaintiff and also against Reed on his cross-bill. From this judgment, Sellers, the plaintiff, appealed.

Moore & Ledbetter and *Timmons & Brown*, for appellant, cited *Welder v. Carroll*, 29 Tex., 333; *Johnson v. Gresham*, 5 Dana, 543; *Smith v. Prewitt*, 2 Marsh., 157.

No brief for appellees came to the hands of the reporters.

MOORE, ASSOCIATE JUSTICE.—There can be no doubt that Henry and Moore, by their deeds to Wilson and Cobb, conveyed all the land included in the Patrick Allison grant. These deeds bear date on the same day, and show upon their faces that the sales to Wilson and Cobb were contemporaneous transactions, and also show that the tracts of land conveyed to them bound upon each other. Unless we totally discard the description of the premises intended to be conveyed, contained in these deeds, it is plainly impossible to admit that they have a common boundary, without also conceding that they include the entire Allison survey. The fact that there is more land in the survey than the parties to these deeds supposed when they were executed, is, in this case, a matter of no importance whatever. There is certainly no such discrepancy in the

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quantity of land supposed to be embraced in the survey, and that which it is actually found to include, as to raise a presumption of mistake or fraud in the deeds; and if there were, only the grantees, or some one representing them, could complain.

The mention in these deeds of the number of acres sold to the purchasers, shows the quantity of land supposed at the time, no doubt, to be in the Allison grant, and the relative proportions of it purchased by the vendees, Wilson and Cobb, and was intended as a guide in determining where the line dividing the land between them should be fixed.

The deeds to Wilson and Cobb were, as we have said, contemporaneous, and have mutual reference to each other. They were intended to include all of the land embraced in the Allison grant; and whether it turns out that there is a greater or less number of acres in the grant than was supposed when the deeds were executed, no preference can be given to the one over the other, unless other facts than those exhibited by the deeds are shown which will warrant such preference. And unless this can be done, it follows, as was held in the case of *Welder v. Carroll*, 29 Tex., 317, that the seventy-four and four-tenths acres, which the Patrick Allison grant is found to contain, more than was supposed when the deeds were made, should be divided between the parties in proportion to the quantity of land called for in their deeds.

It is insisted by counsel for appellants, that the excess should be partitioned in proportion to the relative amounts of purchase-money paid by the vendees. We are cited, however, to no case where this has been taken as the guide in apportioning the excess or diminution in the quantity of land to be divided between purchasers. In the absence of evidence showing that equity requires the application of a different rule, we think the apportionment should be made, as was held in the case cited, by reference to the quantity of land called for in the deeds, rather than the amounts paid for it by the parties.

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The question at issue between these parties is, the proper location of their common boundary, and is to be determined by the proper construction of the boundaries and descriptions of the land furnished by their deeds. The price paid by the purchasers for their respective tracts is a matter in which they have no mutual interest, but is altogether between them and their vendor. If the sale was by the acre, and not in gross, as between the vendor and vendee there would be a just ground to demand an increase or diminution of the amount to be paid for the land; but it is not seen how the fact that one of the tracts was worth more than the other, or that one of the vendees put a higher estimate upon it than the other, should affect, as between them, the apportionment of the excess or deficit of quantity of the entire tract. The inference is, that the parties contracted for the land conveyed by their deeds, and that the number of acres mentioned was merely the estimate of quantity (if the sale was by the acre) by which the price was fixed. It is therefore much more presumable that the purchaser has gotten the land for which he in fact contracted, when its boundaries are defined by reference to those parts of the deed designating and describing the land conveyed, than from the amount agreed to be paid for it, and especially as this is a matter in which the other purchaser is in no way interested.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

M. J. WRIGHT v. J. C. & E. M. WOOTERS.

1. FORECLOSURE—PARTIES.—A decree of foreclosure does not conclude a purchaser whose rights in the property were known before the commencement of the foreclosure proceedings.
2. WAIVER OF VENDOR'S LIEN—NEW SECURITY.—In a suit by one claiming as the vendor, and also under a foreclosure and sale, and

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against one not a party to the foreclosure proceedings, having purchased prior to such suit, the question, whether the vendor was precluded from enforcing his "superior title" as against the assignee of the purchaser, the purchase-money not being paid, is material, and should be submitted to the jury, if pleaded in defense.

3. **VENDOR'S TITLE, WHERE PURCHASE-MONEY HAS NOT BEEN PAID.**
While the doctrine that a mortgage to secure the purchase-money, executed by the vendee at the time he receives his conveyance, has the effect to make the contract executory, is well settled by the decisions of this court, it is believed that its extension, so as to give like rights to others than the vendors, may lead to confusion; and such application of the principle should only be made where the right is clear.
4. **PRACTICE.**—A purchaser at such foreclosure sale (and particularly, if the plaintiff) has the right of action to foreclose against the subsequent purchaser; in which suit the subsequent purchaser would have the right to make any defense he has; to put in issue the execution of the mortgage; if other lands were included in the mortgage, he may have necessary parties made, and the question of amount, with which the tract of land is chargeable, investigated, and have other lands, which were included in the mortgage, subjected to the debt, so that the tract purchased shall be subjected only to its proper proportionate amount.
5. **WAIVER.**—Taking a new note with security, for a note secured by mortgage, is not a waiver of the mortgage, unless expressly intended to have that effect.

APPEAL from Houston. Tried below before the Hon. L. W. Cooper.

The opinion contains a sufficient statement of the case.

D. A. Nunn, for appellant.

W. A. Stewart and Chandler, Carlton & Robertson, for appellees.

GOULD, ASSOCIATE JUSTICE.—This suit was commenced and tried as an action of trespass to try title. The title on which the appellees, who were the plaintiffs, recovered, was under a purchase at a sale, by virtue of a decree foreclosing a mortgage, in a suit by the plaintiffs against Daniel Dailey, as the mortgagee, and Wm. H. Cundiff, as surety. The evidence

shows, that "long prior to the institution of the suit to foreclose, Dailey had conveyed the land in controversy, by deed, with covenants of warranty, duly recorded, to Texana P. Hays, who went into possession and made valuable improvements; that she had conveyed it, by deed duly recorded, to one Simpson, and that Simpson had conveyed to Joseph A. Wright, (husband of the appellant, and deceased during the pendency of this suit,) who also went into possession before the commencement of the suit to foreclose. These facts show clearly that the plaintiffs in the suit to foreclose had notice that Wright was the owner of whatever title Dailey had, and that Wright should have been made a party defendant to that suit. Repeated decisions of this court, since a rehearing of this cause was granted by our predecessors, are to the effect that a sale under such a decree does not pass the title as against the purchaser of whose claim there is notice. (*Preston v. Breedlove*, 45 Tex., 47; *Lockhart v. Ward*, 45 Tex., 227; *Johnson v. Byler*, 45 Tex., 509, and authorities cited in those cases.)

It is evident that the recovery of appellees was on their title derived by purchase at the foreclosure sale, and that the case, as tried, was upon that issue, and not upon any legal or equitable title in plaintiffs, by virtue of the mortgage claimed to have been taken from Dailey at the time he received a deed. Whether there was, or was not a mortgage, was a disputed fact, which, before the plaintiffs could recover, on the ground that the legal title remained in the estate of John Long, and passed to the ward of plaintiffs when, in the distribution of the estate, the note, secured by the mortgage, was allotted to her, was a question on which the defendant was entitled to have the jury pass, without reference to the judgment of foreclosure. If the recovery had been sought on that ground, it might have been made a question how far the rights of the appellees were affected by the settlement of the mortgage debt by Dailey, at or about the time of the foreclosure sale, and whether, under all the

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circumstances, they had any other rights than, as purchasers at the sale, to be subrogated to the right to foreclose.

Without undertaking to decide that the plaintiffs could or could not have recovered, on the ground that the legal title had never passed to Dailey, or his vendees, but was in their ward, we deem it proper to say, that, whilst the doctrine, that a mortgage to secure the purchase-money, executed by the vendee at the time he receives his conveyance, has the effect to make the contract executory, is well settled by numerous decisions of this court, it is believed that its extension, so as to give like rights to others than the vendor, may lead to confusion, and that such applications of the principle should be made only in cases where the right is clear.

In the view which we have taken of the case, it becomes unnecessary to notice many of the errors assigned and questions discussed. It is deemed proper, however, to intimate that the plaintiffs may, if they see proper, amend their pleadings so as to claim a foreclosure, and that in that event, the defendant may, if he see fit, have Dailey made a party, and may have the question investigated as to the amount with which the land is properly chargeable in his hands, and the extent of his remedy over against Dailey. If there was a mortgage duly recorded, but including other tracts of land, and if that mortgage is still in force, not waived or released, certainly the plaintiffs are entitled to enforce it, but the defendant may claim, unless good reason is shown why the same should not be done, that the other mortgaged lands be subjected also, or that the land in his hands be subjected only to its proper proportionate amount. (*Ayres v. Cayce*, 10 Tex., 107.)

With the view, if possible, of shortening this already protracted litigation, we will add, that the taking of a new note, with different sureties, did not of itself, unless so intended, operate as a release or waiver of the mortgage. The general rule is, that a mortgage to secure a promissory note "will remain security for any new note given in payment of the

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former one, unless there is an intention to the contrary." (Hilliard on Mortg., chap. XVI, secs. 4 and 5; *Burdett v. Clay*, 8 B. Monroe, 287.)

There is a wide distinction between a mortgage and a vendors' lien; and facts would amount to a waiver of the latter, which would be wholly insufficient in case of an express lien, reserved by mortgage. (See *Burdett v. Clay*, *supra*.)

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Justice MOORE did not sit in this case.

A. B. KERR v. W. J. HUTCHINS.

1. **FRAUDULENT CONVEYANCE—ESTATES OF DECEDENTS.**—To maintain a suit against an executrix of an estate, (who by the terms of the will is not under the control of the Probate Court,) and against one to whom the petition alleges that a fraudulent mortgage of property had been made by the testator, for the purpose of setting aside the conveyance, the plaintiff, who claims to be a creditor of the estate, must show—
 1. That he has a valid claim against the estate.
 2. That as to his debt, the mortgage was fraudulent, and that as a fraudulent incumbrance, it constitutes a substantial impediment to the collection of his debt.
2. **SAME.**—The facts entitling such party to a recovery being established, the judgment should be against the executrix for the amount of the debt, and a decree against the claimant, under the fraudulent mortgage, cancelling it as to so much of the property mortgaged as might be necessary when levied on and sold, to satisfy the plaintiff's judgment.
3. **APPROVED.**—*Hall v. McCormick*, 7 Tex., 278, 279, approved.
4. **JUDGMENT—FRAUDULENT CONVEYANCE.**—A judgment rendered in a suit by a creditor against an executrix, and one claiming under the fraudulent conveyance, which sets aside such conveyance so far as the same may be necessary to secure the plaintiff's debt, does not affect the validity of the conveyance beyond its terms, so far as the

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executrix is concerned, nor as to other creditors who have not asked relief.

5. VERDICT.—The court should not receive a verdict which fails to find material issues submitted in the charge.
6. FRAUD.—In a suit to set aside a mortgage as fraudulent, the facts being established that the party charged with the fraud was largely indebted, at the time the mortgage was made, to various creditors, and mortgaged to one creditor “the mass” of his property, leaving not enough to satisfy the demands of other creditors, does not authorize the court to charge that such facts constituted fraud in law. It is the province of the jury, and not of the court, to draw the inference of fraud from such facts.
7. APPROVED.—*Baldwin v. Peet, Sims & Co.*, 22 Tex., 708, and *Briscoe v. Bronaugh*, 1 Tex., 326, approved.

APPEAL from Colorado. Tried below before the Hon. L. Lindsay.

W. J. Hutchins, the appellee, filed his suit in the District Court of Colorado county against Sarah B. Mercer, executrix of her late husband, Levi Mercer, deceased, alleging that Mercer owed him a note of \$3,092.82, with ten per cent. interest, bearing date in October, 1861; that he had made a will, and appointed his wife, the said Sarah B. Mercer, executrix, without security and independent of the Probate Court, according to the statute respecting independent wills, &c. The said executrix failed to give any bond as such executrix, and yet had proceeded to manage the business of the estate in said Probate Court, &c.; that the said executrix had allowed a certain note for about \$6,500, secured by a vendor's lien upon certain real estate, and by mortgage upon certain other real estate, of said Mercer's estate, and that the probate judge had approved the same and granted the application of the executrix to sell the property for the satisfaction of the debt and interest so claimed to be due to said Kerr; that in fact the note had been fully paid off and discharged by Mercer before his death, and was now allowed and approved and ordered to be paid, by collusion and fraud. The petition prayed for and obtained a writ of *certiorari*, to bring up said cause to the District Court, &c.

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William J. Hutchins afterwards filed another petition in the same court, against said Sarah B. Mercer, executrix, and A. B. Kerr, in which it was charged that the note, lien, and mortgage claimed by Kerr and allowed by the executrix had been paid and satisfied by Mercer before his death; and that if the same was then in the hands of A. B. Kerr, he only held the same for the use and benefit of Mercer, and had no interest in the same; that the note, lien, and mortgage were only attempted to be kept alive for the fraudulent purpose of defeating the other creditors of said estate, and to enable Kerr to protect the property of Mercer from his creditors, and prayed that the same be canceled and fully discharged as paid. To this petition, Kerr answered by general demurrer and general denial, March, 1867.

On the 24th of October, 1870, W. J. Hutchins filed his amended petition, setting forth the allegations in his original petition about the Kerr note and claim, and declaring that on the 15th day of December, 1863, the note of \$6,500 was payable to one E. W. Glenn, and was on that day paid off by Mercer, but that Glenn, at the request of Mercer, assigned the same to Kerr; "and it was the understanding of Mercer and Kerr, at the time of said assignment, that the said Kerr was to hold said note, in order to secure him in the amount which he (Kerr) had paid to Glenn for Mercer on said note," &c.; that "when the arrangement aforesaid was made, Levi Mercer was a man of wealth and owned a large number of negroes, but in 1865 (the date of the acknowledgment of the justice of the note by Mercer and the execution of the mortgage to Kerr on his lands to secure its payment) the negroes of Mercer had been freed, and he was largely indebted and unable to pay said debts, which facts were known to Kerr, and said acknowledgment was made, and said mortgage executed by the said Mercer, for the purpose of delaying, hindering, and defrauding his creditors, and for the purpose of protecting his property from his creditors," &c. "Plaintiff relied on all the allegations in his original peti-

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tion, and prayed that the court may determine from the facts how much of said note Kerr really owns, and only permit him to hold said amount against the estate of said Mercer, and for general relief," &c.

On the 6th of October, 1870, Kerr filed his amended answer, in which he admitted the death of Mercer, his independent will, the allowance by the executrix of his claim upon the note, lien, and mortgage, but denied all combination, collusion, or fraud, and averred that he was the true, legal owner of the \$6,500 note, with its purchase-money lien, and the mortgage for its further security, and that he purchased the same from E. W. Glenn, in good faith, and paid therefor a just, full, and fair consideration; and that Glenn, in 1863, indorsed in writing, transferred, and delivered said note, lien, and mortgage to defendant Kerr, under and by which he claimed and owned the whole as his own property.

In 1871, the two cases, Nos. 2163 and 2166, were consolidated and tried, resulting in a judgment in favor of Hutchins for his debt against the estate in the hands of the executrix, and annulling, as fraudulent and void, the claim of Kerr, in case No. 2166, and dismissing the other case, No. 2163, on the ground that the Probate Court had no jurisdiction over the estate under the independent will, and could not, by *certiorari*, send the cause to be tried *de novo* in the District Court.

The executrix did not appeal from the judgment against her in case 2166, nor did Hutchins appeal from the judgment dismissing the case No. 2163 against the executrix alone.

Defendant A. B. Kerr, however, did appeal to this court for a reversal of the judgment against him in said cause No. 2166, annulling and setting aside his note for \$6,500, its purchase-money lien, and the mortgage upon other lands given for its further security; and on the 27th day of June, 1872, this court reversed and remanded for a new trial the

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said judgment against A. B. Kerr, upon the grounds and for the reasons set forth in its opinion. (36 Tex., 452.)

When the cause was tried in the District Court, it was upon the same pleadings, except an amendment of the petition, declaring the estate of Levi Mercer insolvent at the time of his death and ever since.

The court below, amongst the charges asked by the plaintiff, gave the following, viz: "Any person who is largely indebted to various creditors, if he mortgage the whole to one creditor, (which was greatly more than sufficient to secure the debt of said creditor, said creditor knowing such indebtedness,) or the great mass of his property, leaving not enough to satisfy the demands of the other creditors, it is fraud in law, as to such other creditors, because it operates to hinder or delay such other creditors, although the purpose of the parties might not have been directly for the purpose of defrauding the other creditors."

The evidence is voluminous, and its statement is not rendered necessary by the opinion.

The jury returned the following verdict: "We, the jury, believe there to be a combination between Mercer and defendant Kerr to hold the property against the other creditors, and we find a verdict in favor of the plaintiff Hutchins for the principal and interest at eight per cent."

Upon this verdict the court proceeded to render judgment, annulling the note of \$6,500, and discharging the lien in its favor for purchase-money on the land for which it was given, as well as the mortgage on other lands for its further security.

From this judgment the appeal was taken.

J. R. Burns, for appellant, argued at length the proposition that the charge of the court, which informed the jury that the condition of facts referred to in the statement of the case constituted fraud in law, was erroneous.

No brief for appellee has reached the reporters.

Long & Long, also for appellant.

ROBERTS, CHIEF JUSTICE.—To maintain this suit, it was incumbent on the plaintiff, Hutchins, to show that he had a valid claim against Sarah B. Mercer, as executrix of the will of her husband, Levi Mercer, deceased; that as to his said debt, the mortgage of A. B. Kerr upon the property in her hands, was fraudulent; and that this fraudulent incumbrance was a substantial impediment to the collection of his said debt.

Upon establishing these facts, the extent of the plaintiff's remedy was to obtain a judgment against the executrix, for the amount of his debt, a decree against A. B. Kerr, that his mortgage should be void as to so much of the property belonging to said estate as might be necessary, when levied on and sold, to satisfy the judgment of plaintiffs so recovered. (The executrix, by the terms of the will, was not under the control of the Probate Court.)

That such a suit can be maintained, upon showing that there was not sufficient effects left, unincumbered by the fraudulent conveyance, to pay the debt, was held by this court. (*Hall v. McCormick*, 7 Tex., 278-9; *Story's Eq. Pl.*, sec. 227.) It would not follow from this that Kerr's debt and mortgage lien were void as to the executrix, or as to other creditors, who did not choose to assert any right against them. (*Story's Eq. Juris.*, sec. 257*a*.) In that, Hutchins has no interest; and his equitable remedy for relief can extend no further than is necessary to establish and secure his own interest as against Kerr.

From these principles, it is plain that the court was not authorized to render a judgment against Kerr, declaring his note and mortgage absolutely null and void as against the estate of Levi Mercer, if, indeed, it could have been rendered at all, upon the defective, uncertain, and indefinite verdict, which said: "We, the jury, believe there to be a combination between Mercer and defendant, Kerr, to hold the property against the other creditors."

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This verdict, though partly special, contains no finding on the issue of insolvency of Mercer, or whether or not it was necessary for the plaintiff to resort to the mortgaged property in order to collect his debt, which was the important matter that authorized the making of Kerr a party to this suit. The court should not have received a verdict which so far failed to find the material issues in the case submitted to them; or if the jury would find no other, the court should have declined to render a judgment against Kerr on so imperfect and irrelevant a verdict.

Another question arises upon the charge of the court, in reference to the conflicting evidence on the issue of fraud.

There was evidence tending pertinently to establish that the debt and mortgage of Kerr, as to creditors, were fraudulent; and, also that they were not so fraudulent. It was therefore important to leave the fact of fraud in the transaction fairly and fully to the judgment of the jury.

The court charged the jury, at the instance of plaintiff's counsel, as follows, in substance: "that if Levi Mercer was largely indebted to others, and mortgaged all of his property to Kerr, that was an acknowledgment of his insolvency." And further, "that if said Mercer was largely indebted to various creditors, and mortgaged to one creditor the 'mass' of his property, leaving not enough to satisfy the demands of other creditors, it is a fraud in law, as to such other creditors, because it operates to hinder or delay such other creditors, although the purpose of the parties might not have been directly to defraud the other creditors.

While these may often be, especially in connection with other concurring circumstances, very reasonable conclusions of fact, they are certainly not rules of law, and the court materially erred, in so instructing the jury, in reference to the facts of this case. It is province of the jury, and not of the court, to draw the inference of fraud, from such and similar facts, as has been repeatedly held by this court.

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(*Baldwin v. Peet*, 22 Tex., 708; *Briscoe v. Bronaugh*, 1 Tex., 326.)

For these errors, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

J. R. MORRIS v. J. S. & W. H. SELLERS.

FACTOR—PURCHASER.—Ordinarily, the possession of cotton by a cotton factor, who is a factor only, not engaged in buying and selling on his own account, raises a presumption that the cotton does not belong to him, but is held on commission for another; but this presumption may be rebutted by the real owner permitting his ownership to be concealed, and the property to be so acquired, managed, and possessed, by the factor, as to indicate to third persons that the factor is the real owner. Under such circumstances, the factor, so held out as the real owner, may sell the property, in discharge of his previous debt, to one who had no notice, actual or constructive, of the defects in his title, and the sale will be valid.

ERROR from Galveston. Tried below before the Hon. A. P. McCormick.

Peel & Dumble, a firm of factors and commission merchants, were doing business in the city of Galveston, and the defendants in error were also factors and commission merchants, doing business in the same place. Peel & Dumble, on the 19th of September, 1865, shipped Sellers & Sellers forty-one bales of cotton, of certain marks, and on the 30th of September, 1865, shipped them nine more bales of cotton, to be sold for their account. Sellers & Sellers advanced, per contract, \$75 per bale, to Peel & Dumble, on the day of their shipment. The cotton was to be sent to New York, and there sold for account of Peel & Dumble. The cotton was lost at sea, and Sellers & Sellers collected the insurance, \$200 per bale, and applied the proceeds to the indebtedness of the said Peel & Dumble to W. H. Sellers, (to whom they were

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largely indebted,) according to an agreement made between Sellers & Sellers and Mr. Dumble.

On 1st December, 1866, J. R. Morris filed his petition in the District Court of Galveston county, alleging that he shipped Sellers & Sellers said cotton, and that they had never accounted to him for the proceeds, and prayed judgment for \$13,500.

It was in proof, on the trial in the court below, that the cotton was turned over to Sellers & Sellers by J. A. H. Cleveland, (who was the business manager of the firm of Peel & Dumble, and had entire control and management of their business in Galveston,) as the cotton of Peel & Dumble; that, under instructions from Dumble, he saw John Sellers, in Galveston, and obtained an advance of \$75, gold, per bale for forty-one bales, the first lot, and turned over the cotton; the same thing was subsequently done with the second lot of nine bales, and the same amount advanced.

Cleveland testified, that he thought, at the time, the cotton belonged to Peel & Dumble, and that he was subsequently told by Dumble that the eighteen bales, marked H, were bought by D. McClower & Co. for Peel & Dumble.

W. H. Sellers testified that Peel & Dumble were largely indebted to him; that he was pushing them for payment; that they agreed to ship J. S. Sellers & Co. cotton, if they would give him liberal advances, and that the balance might be retained by them, and applied on their indebtedness to W. H. Sellers; that there was an express agreement to this effect on all cotton shipped them by Peel & Dumble—(on this point the testimony was conflicting.) He also testified that this large advance of seventy-five dollars per bale was agreed to be advanced in view of their previous agreement.

John Sellers testified that this large advance was made to induce the shipment of cotton, that W. H. Sellers might get his money due from Peel & Dumble.

It was claimed by Morris, over a year after the transaction had passed, that the cotton was his; that he shipped it to

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Peel & Dumble, to be sold for his account, and that defendant should account to him for the proceeds of the cotton. To prove this, he introduced the evidence of Mr. Dumble, who testified that he was one of the firm of Peel & Dumble; that plaintiff advanced him four thousand dollars to buy cotton with, and that with the money he purchased this and other cotton, and that the transaction was entirely an individual transaction between him and Morris; that no books other than a private memorandum book were ever kept between him and Morris, and that as to this transaction, the name of Morris did not appear on the books of Peel & Dumble at all, either at Houston or at Galveston, at both of which places Peel & Dumble did business. The evidence showed that Morris never regarded defendants as having anything to do with him in this transaction, but that his business dealings were with James F. Dumble and not with Peel & Dumble, although he authorized them to ship one lot to Peel & Dumble, at Galveston, to be sold for his account; but his whole transactions were those of friendship for Dumble; he borrowed the money and hypothecated his real estate to accommodate him. He never had the name of Peel & Dumble on his books, and only kept a memorandum book between himself and Dumble.

There was a verdict and judgment for Sellers & Sellers.

No brief for plaintiffs in error has reached reporters.

Flournoy & Sherwood, for defendants in error.

ROBERTS, CHIEF JUSTICE.—To maintain this suit, it was incumbent on J. R. Morris to allege and prove that the fifty bales of cotton in controversy was his property at the time that Peel & Dumble let J. S. Sellers & Co. have them. If the jury were satisfied of that fact, the next question was, were they satisfied from the evidence that Peel & Dumble, upon receiving an advance of seventy-five dollars, in gold, per bale, placed the said fifty bales of cotton in the

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hands of J. S. Sellers & Co., at Galveston, to be by them shipped to New York, under an agreement that the proceeds of the sale thereof should be appropriated by them to the payment of a previous debt, due from Peel & Dumble to W. H. Sellers, who was one of the firm of J. S. Sellers & Co.?

The evidence on this issue was conflicting, and the jury, from their verdict for defendants, must have found in the affirmative.

The remaining question was, did Peel & Dumble have the possession and apparent ownership of said cotton in Galveston, by the permission of Morris, under such circumstances as that J. S. Sellers & Co. could legally contract for the same with Peel & Dumble as their own property, in discharge of a previous debt due to W. H. Sellers from Peel & Dumble.

Upon this issue, the court charged the jury, that "If you believe from the evidence that the cotton in question was the cotton of plaintiff, and you should further believe from the evidence that the plaintiff so placed said cotton in the hands of Peel & Dumble, as to conceal the fact of his being the owner, and to hold out said Peel & Dumble as the real owners, then, as to third persons without notice, or to defendants here, Peel & Dumble's contracts, in reference to said cotton, would be as binding on the plaintiff as on themselves."

The facts to which this charge applied were, that Peel & Dumble were factors and commission merchants, having one house in Houston, and one in Galveston, and so was J. S. Sellers & Co., in Galveston; that as an act of friendship to James F. Dumble, of the firm of Peel & Dumble, the plaintiff Morris, during the summer and fall of 1865, advanced to James F. Dumble four thousand dollars, with part of which he bought the fifty bales of cotton for the plaintiff, who directed him that he might ship it to whom he pleased, and account to him for the proceeds when the cotton was sold, in pursuance of which the cotton was sent to the house

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of Peel & Dumble, with request made to their manager, at Galveston, by James F. Dumble to ascertain what advance J. S. Sellers & Co. would make on the cotton, which resulted in the cotton being turned over to them to be shipped for and on account of Peel & Dumble. It was shown that Morris was not known in the purchase of the cotton, nor in the transmission of it to the Galveston house of Peel & Dumble, where it was received from their house at Houston, as the cotton in the name of and for account of Peel & Dumble. Morris's name is not found in connection with this cotton in the books of either house of Peel & Dumble, or with any of the papers pertaining to it. The whole transaction was kept in a private memorandum-book of James F. Dumble, and Morris had no personal knowledge of this lot of cotton.

Upon these, and other facts tending in the same direction, the jury must have concluded that Morris permitted this cotton to be so managed by Peel & Dumble as to make them the ostensible owners of it, notwithstanding the contrary presumption arising from their capacity of factors and commission merchants. There was sufficient evidence to authorize them in coming to that conclusion, there being no evidence whatever that J. S. Sellers & Co. had any notice that the cotton was not the property of Peel & Dumble, or had any means of ascertaining the contrary, a fact not known, or even suspected, by Mr. Cleaveland, manager and book-keeper of Peel & Dumble, who alone handled the cotton at Galveston for them. In reference to the facts in evidence, we are of opinion that the charge of the court was correct.

The possession of cotton by a cotton factor, who is a factor only, not engaged in buying and selling on his own account, would not raise the presumption of ownership, so as to authorize others, who knew him to be only a factor, to deal with him in all respects as the owner. (Story on Agency, sec. 113.) The presumption would rather be, in such case, that he was in possession of it, on commission, for some other owner. It is well settled, however, that such presumption

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may be rebutted, by the real owner permitting his ownership to be concealed, and the property to be so acquired, managed, and possessed as to indicate to third persons that the factor is the ostensible and real owner of the property; and such ostensible owner, so held out as the real owner, may sell the property, in discharge of his previous debt, to one who has no notice, actual or constructive, of the defect of his title to it, and the sale will be held valid.

Without discussing the principles involved in these rules of law, it will be sufficient to refer to some of the authorities which sustain them: Story on Agency, sec. 390; 2 Kent's Comm., 632; 2 Smith's Lead. Cases, pp. 160-162, and notes; 7 Term Rep., 359; Parker v. Donaldson, 2 Watts & Serg., 21; Hogan v. Shorb, 24 Wend., 461, 462; Mitchell v. Bristol, 10 Wend., 493; Hutchinson v. Bours, 6 Cal., 385; L. R. Bank v. Plimpton, 17 Pick., 159.

The judgment is affirmed.

AFFIRMED.

C. J. BORDEN v. T. J. McRAE ET AL.

1. **VENDITIONI EXPONAS.**—That a *venditioni exponas* is a writ of execution, and confers upon the officer to whom it is directed authority to sell land upon which the writ of *feri facias* has been levied, cannot be regarded an open question in this court.
2. **SAME.**—The same rule obtains where a levy has been made upon land in a different county from that where the judgment was rendered.
3. **LIEN BY LEVY OF EXECUTION.**—The plaintiff in execution acquires a fixed and certain interest in the land upon which his execution is levied, from the date of the levy, which entitles him to have satisfaction of his judgment by its sale, and which cannot be defeated or interfered with by the defendant in execution, or any one setting up a subsequent right or claim to the land through or under him.
4. **PRACTICE—AUTHORITY TO ISSUE THE WRIT.**—The return of the execution exhibiting an unsatisfied levy, and thereby showing property of the defendant in *custodia legis* for the satisfaction of the

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- judgment, not only authorizes, but requires, that proper process shall issue for its disposal. This process is the writ of *venditioni exponas*.
5. BONA FIDE PURCHASER.—A. levy upon lands under an execution fixes a lien, which upon sale under the execution, or *venditioni exponas*, passes title against an unrecorded deed; nor is the title effected by notice after the levy and before the sale.
6. CASE APPROVED.—*Grace v. Wade*, 35 Tex., 522, approved.
7. It is not within the scope or authority of the writ of *venditioni exponas*, to subject to sale the property to which the general lien of the judgment attaches, but merely that to which a specific right or lien has been acquired by the levy of the *feri facias*.

APPEAL from Walker. Tried below before the Hon. James R. Burnett.

C. J. Borden sued Frank Tillman, in the District Court of Brazoria county. Service was had by publication, but at the November Term, 1869, of that court, Tillman appeared by attorney, and on November 10, 1869, judgment was rendered for plaintiff, for \$1,056.76 and costs of suit. On this judgment, November 19, 1869, execution was issued to the sheriff of Brazoria county, and was by him returned "not satisfied." December 7, 1869, an alias execution issued to the sheriff of Walker county, which, on December 13, 1869, was levied on one half a league of land, the property of defendant. Sale was advertised for the first Tuesday in January, 1870; the execution was indorsed, "Sale held up till the first Tuesday in May, 1870, by direction of plaintiff's attorney, and this writ returned for want of time, and a *venditioni exponas* asked for this, March 31, 1870. W. H. Stewart, sheriff Walker county, Texas."

May 26, 1870, *venditioni exponas* issued to the sheriff of Walker, requiring him to sell the land so levied on, as under execution, which came to the hands of the sheriff on 31st May, 1870. The land, under this writ, was regularly sold by the sheriff, on the first Tuesday in August, 1870, to the plaintiff, for eight hundred and nine dollars. The costs were paid, and the remainder credited upon the execution, when the sheriff made a deed to the plaintiff.

Argument for the appellant.

October 15, 1869, Tillman executed a deed for the land, for \$2,000, to his brother-in-law, T. J. McRae. February 11, 1870, the deed was filed for record in Walker, and placed on record, though defectively acknowledged.

This suit was brought May 11, 1871, by Mrs. C. J. Borden, setting up the facts, and charging that the deed from Tillman to McRae was made to hinder and delay Tillman's creditors; that he was, at its execution, insolvent; which fact McRae knew, and aided him in this way, to defraud his creditors; judgment was asked that the cloud upon the title of plaintiff, by reason of the deed to McRae, be removed, &c. McRae denied the charges of fraud, and set up title under the deed to him.

This case was before the Supreme Court before. (Borden v. Tillman, 39 Tex., 262.)

The facts necessary appear in the opinion. The court instructed the jury—

"The deed to defendant purports to be recorded in February, 1870; but this was no legal record, as the deed was not properly acknowledged or proved, so that such record is not, of itself, notice of defendant's claim. But if you believe from the evidence that the plaintiff, or her attorney, had actual notice of defendant's claim, or of such facts and circumstances as would admonish a reasonably prudent man that the title was in another party, or put him upon inquiry respecting such adverse claim, then defendant's title, being the older one, is the best, unless it has been shown to have been fraudulent."

The testimony showed that the attorney of Mrs. Borden, the plaintiff, had read the record of the deed from Tillman to McRae, before the sheriff's sale. Judgment was rendered for defendant, and plaintiff appealed.

L. A. Abercrombie and *James A. Baker*, for appellant, cited *Lockridge v. Baldwin*, 20 Tex., 303; *Catlin v. Jackson*, 8 Johns., 547; *Riddle v. Bush*, 27 Tex., 675; *Leeland v. Wil-*

Argument for the appellees.

son, 34 Tex., 94; *Fenno v. Cooper*, 14 Ark., 39; *McMiller v. Butler*, 20 Tex., 402; *Burdett v. Chandler*, 22 Tex., 14; 1 Peters, 423; *Paschal's Dig.*, 4978, 4983, 4988; *Bennett v. Cocks*, 15 Tex., 67; *Ayres v. Duprey*, 27 Tex., 606; *Tillman v. Cowand*, 12 Smedes & Marsh, 262; *Shultz v. Moore*, 1 McL., 521; *Duphey v. Thenaye*, 5 Stewart & Porter, 215; *Carter v. Champion*, 8 Conn., 548; *Galt v. Dobrell*, 10 Yerg., 146; *Hodgson v. Butts*, 3 Cranch, 140; 17 Me., 418; *J. J. Marsh*, 4; *McNitt v. Turner*, 16 Wall., 352; *Hawley v. Bullock*, 29 Tex., 222; *Kerns v. Swope*, 2 Watts, 75; *Emerson v. Littlefield*, 12 Me., 148; *Blankenship v. Douglas*, 26 Tex., 225; *Rogers v. Burchard*, 34 Tex., 441; *Orme v. Roberts*, 33 Tex., 768; *Davie v. Littlejohn*, 2 Ired. Eq., 295; *Pendleton v. Batton*, 3 Conn., 406; 9 Yerg., 64.

L. A. Albercrombie, for appellant, discussed the questions of fraud raised, and cited *Gibson v. Hill*, 23 Tex., 82; *Briscoe v. Bronaugh*, 1 Tex., 335; *Stadtler v. Wood*, 24 Tex., 622; *Mills v. Howeth*, 19 Tex., 257; *Banks v. Green*, 24 Tex., 508; *Howerton v. Holt*, 23 Tex., 62; *Bryant v. Kelton*, 1 Tex., 415; *Van Hook v. Walton*, 28 Tex., 59; *Garahy v. Bayley*, 25 Tex. Supp., 294.

Randolph & McKinney, for appellees, cited *Bump on Fraud*. Conv., 36; *King v. Russell*, 40 Tex., 124; *Wells v. Barnett*, 7 Tex., 584; *Ayres v. Duprey*, 27 Tex., 593; *Orme v. Roberts*, 33 Tex., 773; *Dickerson v. Tillinghast*, 4 Paige, 215; *Wright v. Douglass*, 10 Barb., 97; *Herman on Ex.*, pp. 487, 488; *Corse v. Stafford*, 24 La., 262; *Elliott v. Knott*, 14 Md., 21; *Leland v. Wilson*, 34 Tex., 94; *Wood v. Colvin*, 5 Hill, (N. Y.,) 230; *Catlin v. Jackson*, 8 Johns., 546; *Hargrove v. DeLisle*, 32 Tex., 170; *Mercein v. Burton*, 17 Tex., 210; *Herm. on Estopp.*, sec. 183; *Bagley v. Ward*, 37 Cal., 121; *Freem. on Judgm.*, sec., 394; 2 Story's Eq., sec. 1031; *Duty v. Graham*, 12 Tex., 436; 2 Story's Eq., note 3, pp. 664, 665; 3 Pars. on Cont., 278; *Coote on Mort.*, 248; *Montague on*

Lien, 100; 3 Sugd. on Vend., 184; Burgess v. Wheat, 1 Black, 150; Mackreth v. Symmons, 15 Ves., 345; Lacon v. Mertins, 3 Atk., 1; Ætna Ins. Co. v. Tyler, 16 Wend., 385; Lowell v. Middlesex Ins. Co., 8 Cush., 127; Shirley v. Shirley, 7 Blackf., 452; 4 Tex., 159; 17 Tex., 10; 3 Tex., 476; 11 Tex., 237; Byers v. Engles, 16 Ark., 543; 4 Dana, 258; 4 Marsh., 293; Farley v. McAlister, 39 Tex., 602.

MOORE, ASSOCIATE JUSTICE.—That a *venditioni exponas* is a writ of execution, and confers upon the officer to whom it is directed authority to sell land upon which the writ of *fiery facias* has been levied, cannot now be regarded as an open question in this court. (Lockridge v. Baldwin, 20 Tex., 303; Young v. Smith, 23 Tex., 598, and cases cited.) Nor is it perceived that the fact that the land upon which the *fiery facias* is levied is situated in a different county from that where the judgment is rendered detracts from the authority of the court to issue the writ, or in any way invalidates the sale of the land under it. It is not within the scope or authority of the writ of *venditioni exponas* to subject to sale the property to which the general lien of the judgment attaches, but merely that to which a specific right or lien has been acquired by the levy of the *fiery facias*. It will hardly be controverted, we imagine, that the plaintiff in execution acquires a fixed and certain interest in the land upon which his execution is levied, from the date of the levy, which entitles him to have satisfaction of his judgment, by its sale, which cannot be defeated or interfered with by the defendant in execution, or any one setting up a subsequent right or claim to the land through or under him. By the levy, the land is subject to the process of the court, and liable to sale for the satisfaction of the plaintiff's demand, and it thereby becomes subject to a lien or specific charge for this purpose from the date of the levy, until it is lost or abandoned, or in some way ceases to have vitality or effect. The return of the execution, exhibiting an unsatisfied levy, and thereby

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showing property of the defendant in *custodia legis* for the satisfaction of the judgment, not only authorizes, but requires, that proper process shall issue for its disposal. This process, as has been often said by the court, is the writ of *venditioni exponas*.

When it is considered for how comparatively short a time the statute has authorized judgment liens to be acquired over land of the defendant, situated in other counties than that in which the judgment is rendered, the suggestion that a *venditioni* could not legally issue, or warrant a sale, unless supported by a judgment lien, would certainly, if there was reason to believe it correct, be well calculated to excite apprehension and alarm in regard to many titles upon which the owners have heretofore reposed with the utmost security and confidence. In consideration of this fact, we have deemed it proper to directly repudiate the views attempted to be maintained by appellant, and to reiterate our unqualified approval of the previous decisions of the court upon the subject.

The court below, in effect, held, by the instructions given the jury, that the protection given creditors against unrecorded deeds by our registration statutes, might, by the record of the deed or other notice of it before the sale of the land under the execution, be rendered entirely nugatory and ineffectual. We had occasion, during the last term at Austin, to consider this precise question, and, after a full and thorough consideration of the previous decisions of this court upon the subject, as well as those in other States whose statutes are similar to ours, we came to a directly opposite conclusion to that expressed in the instructions given the jury by the court below in this case. The elaborate discussion which the subject underwent on that occasion (*Grace v. Wade and Mains*) renders it unnecessary for us to say anything further upon it now. We might, if we thought it necessary, fortify the conclusion at which we then arrived by other reasons, and support it by additional authorities to those then

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cited. We refrained from doing this at the time, however, not because we supposed the subject or the authorities exhausted, but because in our opinion the further discussion of the one, or citation of the other, was unnecessary.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM MASTERSON v. W. C. GOODLETT.

1. "A CRIB OF CORN" is an indefinite quantity, not merely because the capacity of the crib is not stated, but because the expression, in common usage, does not mean a crib full of corn.
2. PAROL EVIDENCE—RECEIPT.—A receipt for a crib of corn, being exhibited as evidence against the maker of it, with parol evidence of its dimensions and a calculation of its capacity, does not preclude the bailee from showing by parol the actual contents of the crib: and *Held*, Error to exclude such testimony.
3. MEASURE OF DAMAGES.—It seems that in an action upon a contract for the delivery of personal property paid for, that interest should not be computed from the time fixed in the contract for its delivery, where a higher value at a subsequent time was adopted as the measure of damages. The interest should only be computed from the date of the valuation fixed.
4. SAME.—Where a bailee took possession of "a crib of corn," at the request of the bailor, and for his benefit, the measure of damages on the bailee for using it would be the value when taken, with interest.
5. SET-OFF—PARTNERSHIP DEBTS.—In a suit by a surviving partner on an obligation for a debt belonging to the partnership, but in his own name, the defendant can set off a partnership claim held by him. By the rule that "the debts must be mutual between the parties," is meant the real, and not merely the nominal, plaintiff and defendant.
6. SAME.—This is the rule without reference to the solvency or insolvency of the members composing the firm.
7. SAME.—The authorities go further, and hold that if the demand sued on was the individual property of the survivor of a firm, the defendant would have the right to set off a partnership debt held by him against the firm.

Argument for the appellee.

8. CASE DISCUSSED.—This case distinguished from *Hamilton v. Van Hook*, 26 Tex., 305.

APPEAL from Brazoria. Tried below before the Hon. A. P. McCormick.

The facts are stated in the opinion.

A. R. Masterson, for appellant, cited Story on Bail., 47 61, 117, 184, 228, 283; 2 Pars. on Cont., 90; Jones on Bail., 94; Browne *v.* Johnson, 29 Tex., 40; Nelson *v.* King, 25 Tex., 662; 2 Greenl. Ev., secs. 636, 644; 3 Phil. on Ev., 451; 2 Kent, 564; Hill on Torts, 100; 32 Barb., 396; 5 Bosw., 293; 8 Md., 148; 12 Grattan, 153; 19 Miss., 467; 2 Greenl., (Redfield's ed.,) secs. 276, 636, 649; Pars. on Cont., vol. 3, (5 ed.,) pages 190 to 202; Story on Bail., (5 ed.,) 545, 555; 3 Kent's Comm., 480, (6 ed.,) 10 Peck, 422; 4 Ib., 466; 15 Ib., 206, 507; 11 Gray, 111; 13 Ib., 313; 3 Bibb., 93; 3 Littell, 27; 13 La., 225; 1 Nott & McCord, 221; 24 Ind., 280; 6 Ga., 530; 25 Ib., 537; 35 Ib., 136; 41 Miss., 368; 40 Ib., 362; 21 Ib., (6 Bennett,) 264; 48 Maine, 186; 35 Ib., 203; 42 N. H., 424; 45 Ib., 545; 47 Ib., 219; 12 Ill., 99, 184; 21 Ib., 118; 36 Ib., 60; 19 Conn., 319; 26 Ib., 389; 29 Ib., 479; 12 Md., 108; 25 Ib., 269; 18 Ib., 468; 5 Harris and J., 211; 2 Nev., 112; 4 Ib., 156; 21 Mo., 279; 40 Ala., 212; 5 Harr., 256; 56 Penn., 454; 5 Watts & S., 106; 4 Minn., 90; 2 Mason, 77; 25 Tex. Supp., 276; 14 Johns., 128, 279; 3 Sandf., 614; Randon *v.* Barton, 4 Tex., 289; Calvitt *v.* McFadden, 13 Tex., 324; Brasher *v.* Davidson, 31 Tex., 190; Cartwright *v.* McCook, 33 Tex., 612; 40 Miss., 472; 3 Kan., 257; 15 La., 280; 1 Smith L. C., 381; 2 Kent, 567; Ogle *v.* Atkinson, 5 Taunt., 759; 17 Ala., 216; 2 Duer, 327; 1 Pothier on Ob., 458.

E. M. Pease, also for appellant.

A. S. Lathrop & *E. J. Wilson*, for appellee, cited, Self *v.* King, 28 Tex., 552; Hunt *v.* White, 24 Tex., 643; 1 Greenl.

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Ev., 227, 228; *Randon v. Barton*, 4 Tex., 289; *Calvit v. McFadden*, 13 Tex., 324; *Brasher v. Davidson*, 31 Tex., 190; *Cartwright v. McCook*, 33 Tex., 662; *Hamilton v. Van Hook*, 26 Tex., 305.

Hancock, West & North, also for appellee.

GOULD, ASSOCIATE JUSTICE.—Goodlett sued Masterson, on his promissory note for \$588, coin, dated December 1, 1865, payable to the order of Goodlett, on the first day of the following April; also on an instrument of writing of the same date, as follows: "Received of William C. Goodlett, one crib of corn, which I agree to return out of the next year's crop, and hold same subject to his order. Also, three stacks of fodder of large size, three cane carts, and one small cart, all of which I promise to return to him as soon as the crop of 1866 is taken off, in as good condition as when received. Brazoria county, Texas, December 1st, 1865. (Signed,) William Masterson."

The petition alleged the quantity and value of the corn and fodder, and that defendant had failed and refused to return them, or their value, when demanded, and in an amended petition judgment was prayed for the highest market value thereof up to the time of trial. In an amended petition, plaintiff also sought to recover on another promissory note for \$150, coin, dated April 4th, 1867, and payable to the order of Goodlett, on the first of January, 1868.

Without attempting to set out the answers of defendant, it is enough to say, that they were sufficient to admit of the evidence adduced, which evidence tended to establish that in the fall of 1866 defendant replaced the corn and fodder in the crib, and on the place where they were, when received by him; that the plaintiff was out of the State, and had no agent to receive it; that he notified plaintiff, by letter, who replied requesting him to take care of the corn; that when defendant removed to another plantation, some six or seven miles

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distant, which he had rented for the year 1867, there was no one on the abandoned plantation, and he therefore removed the corn also, and then used it. Further, that on the return of Goodlett, in the spring of 1867, defendant offered to return the corn he had borrowed, but that Goodlett refused to receive it, and demanded payment in money for a larger quantity of corn than was received, and at a higher price than it was then worth. On the other hand, Goodlett testified, denying any offer to return either corn or fodder. The answer of defendant also alleged, and there was testimony tending to establish the averment, that the corn and fodder, as well as the consideration of the note of December 1, 1865, were the partnership property of the estate of John A. Wharton, deceased, and of plaintiff; that said note and the instrument sued on of same date, were the property of the partnership of Wharton & Goodlett, and that defendant's liability thereon was to the partnership, and that they, were subject to be set off by the note of Wharton & Goddard, for the sum of \$715, dated January 2, 1861, payable twelve months thereafter, to the executor of the estate of McNeil, and legally transferred to defendant.

The answer setting up this set-off alleged the insolvency of Wharton's estate, and the non-residence and insolvency of Goodlett. There was a verdict, and judgment for plaintiff for the sum of \$2286.80, coin, and disallowing the set-off claimed.

The court allowed the plaintiff to prove the dimensions of the crib in which the corn was, and the quantity of corn which a crib of such dimensions would hold, but refused to admit evidence, offered by defendant, to show the actual quantity of corn which was in the crib, and instructed the jury that the written contract to redeliver a crib of corn, imported conclusively, and as matter of law, that the crib was full. We think that this was erroneous. The quantity of corn could not be ascertained from the face of the instrument; and where parol evidence was resorted to, the court should have allowed it to

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extend to the actual quantity. A crib of corn is an indefinite quantity, not merely because the capacity of the crib is not stated, but because the expression, in common usage, does not necessarily mean a crib full of corn. Corn, or cotton in a pen, would naturally be described as a pen of corn or cotton, whether the pen were full or not. The language of the instrument should be construed, as far as may be, according to the intention of the parties; and we think that intention was to say, that the plaintiff received and would return the quantity of corn which was in a certain crib.

The court further instructed the jury to value the corn and fodder at their highest market price, at the place where delivered, from January 1, 1867, up to the time of trial, and to allow interest thereon from January 1, 1867. If the defendant never returned the corn and fodder, as he agreed to do, but was wholly in default, the rule given in charge, and recognized by the decisions of this court, in cases where the purchase-money has all been paid, would be applicable; but it would seem more than questionable whether, even in such case, interest should be allowed, except from the time at which the valuation is fixed. But under the evidence, the jury were at liberty to find that the defendant had complied with his contract, to replace the articles, as fully as he could, in the absence of the plaintiff; that in removing and using them, he was committing no wrong, but only doing what he might well have assumed the plaintiff wished him to do, as being for his best interest; and if such were the facts, it is our opinion that he only made himself liable for the value of the corn and fodder at the time when appropriated by him, with interest from that time.

The court further instructed the jury to disregard the note of Wharton & Goodlett, plead in set-off, unless they found that the plaintiff, the partnership of Wharton & Goodlett, and the estate of John A. Wharton were all insolvent. If, as alleged, and as the evidence tended to establish, the note and obligation of December 1 were the property of the part-

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nership of Wharton & Goodlett, and the recovery of plaintiff thereon would have been for the benefit or use of the partnership, then the debt of the firm in the hands of defendant was a valid set-off thereto. By the rule, that the "debts must be mutual between the parties," is meant the real and not merely the nominal plaintiff and defendant. (Waterman on Set-off, secs. 197, 219, and ref.; *Cowles v. Cowles*, 9 How., (N. Y. Pr.,) 361.)

Counsel for appellee refer to the case of *Hamilton v. Van Hook*, 26 Tex., 305, where an attempt was made to offset the individual claim of the plaintiff by a debt of a firm composed of a number of persons, of whom he was one. The debts were not mutual, either on their face or in fact, and it was held that the "burthen of proof was on the defendant, to show the insolvency of all the parties who were liable on his demand so pleaded in set-off," that being the equitable ground on which he sought to have it allowed. To the extent to which the demand of plaintiff was the property of Wharton & Goodlett, although executed to Goodlett and sued on in his name, the debt of Wharton & Goodlett was a valid set-off, without reference to their solvency or insolvency. Indeed, the authorities go further, and hold that if the demand sued on was the individual property of Goodlett, who was surviving partner of the firm of Wharton & Goodlett, the defendant had the right to set off against it the partnership debt of Wharton & Goodlett. (Waterman on Set-off, secs. 135, 207, note, and citing *Waln v. Hewes*, 5 Serg. & Rawle, 467; *Miller v. Receiver*, 1 Paige, 444; *Byles on Bills*, [290,] 416; *Bourne v. Woolbridge*, 10 B. Monr., 492.)

If all the parties liable on the debt pleaded by defendant in set-off are insolvent, that fact, according to the case of *Hamilton v. Van Hook*, would make it inequitable to reject his set-off to Goodlett's individual claim, though Wharton were still alive, and the firm of Wharton & Goodlett still in existence. But if Goodlett be the survivor of the firm, it is unnecessary to prove such insolvency.

REVERSED AND REMANDED.

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A. J. HUTCHINS ET AL V. MATILDA BACON.

1. VERDICT—INNOCENT PURCHASER—TRESPASS TO TRY TITLE.—

The defendants in trespass to try title pleaded that they were innocent purchasers, who had bought a portion of the land sued for, and had, in good faith, made permanent and valuable improvements thereon. Though there was evidence in support of the plea, the court, in the charge, failed to allude to the subject of improvements, though the jury, in returning a verdict for plaintiffs, added, "the present occupants to hold their improvements." The court, in rendering judgment, treated this portion of the verdict as surplusage : *Held*—

1. That though no judgment could have been rendered on so much as the verdict as clearly intended to protect the defendants in the value of their improvements, it could not be disregarded, as surplusage.

2. If the pleadings had presented no issue of improvements in good faith, or if the evidence had justified the court in withdrawing the issue from the jury, the finding on the subject of improvements might have been rejected.

3. The fact that a purchaser, who has paid for land, did so, with knowledge of an adverse claim, which was, in fact, the better title, is not conclusive of the fact that such purchaser had not acted in good faith.

4. That the verdict, being only a conditional finding for plaintiff, should not have been received.

2. APPROVED.—*Dorn v. Dunham*, 24 Tex., 380; and *Sartain v. Hamilton*, 12 Tex., 222.3. TRESPASS TO TRY TITLE—PRESUMPTION.—A B, who sued as a *feme sole*, in trespass to try title, alleged that she was the owner, and entitled to possession of the land sued for, and that she held the same by regular chain of title, which she filed; one of the deeds was made to her whilst her former husband was yet living. The court refused to charge that the presumption was, that the land was community property, and that the plaintiff could not maintain a suit for it in her own name : *Held*—

1. That there was no error in refusing the charge.

2. Distinguished from *Hatchett v. Conner*, 30 Tex., 111; *Holloway v. Holloway*, 30 Tex., 164; *Owen v. Tankersley*, 12 Tex., 413; and *Moffatt v. Sydnor*, 13 Tex., 628.

4. EVIDENCE—TESTIMONIO.—The testimonio of a deed by public act executed in 1834, cannot be admitted to record without proof of its execution.

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5. **SECONDARY EVIDENCE.**—Secondary evidence of the contents of a paper addressed to a deceased person: *Held*, Admissible after its former existence, its genuineness and loss have been testified to by the executor, and an affidavit had been filed by the attorney of the plaintiff desiring the evidence, that the plaintiff and himself had made diligent search for the paper among the papers of plaintiff, where said paper ought to be, and that it had not been found, but was lost or mislaid.

APPEAL from Harris. Tried below before the Hon. James Masterson.

This suit was brought by Matilda J. Bacon, against A. J. Hutchins, T. B. Holder, Isam G. Searcey, and others, in trespass to try title. The petition alleged that “she is the owner, and entitled to possession,” of the land in controversy; “that she holds said land by regular chain of title from Jesse Denson, which she will show to the court and jury on the trial hereof.” Attached to the petition, and made a part thereof, was a notice of the filing of certain deeds, among which was a deed by Thomas S. Bacon to Matilda J. Bacon, dated 10th May, 1870, which was read in evidence. This deed was made to plaintiff while she was a married woman, the wife of A. B. Bacon, and recited a conveyance of the land to her, in consideration of the sum of one hundred dollars paid the grantor by her. The plaintiff amended, alleging, that since she instituted the suit, she had married one Dinsmore, who appeared and made himself a co-plaintiff.

The defendants, Robert Singleton and T. B. Holder, alleged that they were the owners of the land; that they had purchased the same for a valuable consideration, in good faith, and without notice, &c., and made suggestion of improvements, in good faith, in accordance with the statute.

A general demurrer was filed by all the defendants, and a plea of “not guilty.”

On the trial, the following charge was asked by the defendants, upon the legal effect of the conveyance to Matilda J. Bacon.

“If the jury believe, that at the time that the deed to the land

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in question was made by Thomas S. Bacon to Matilda Bacon, the said Matilda was a married woman, the said land became the community property of herself and husband, and her said husband has since died, then she cannot legally maintain a suit for it in her own name as her separate property—the presumption of law being that property acquired during marriage by onerous title is community property, and it devolves upon the party claiming it as separate property to show it.”

The refusal of this charge by the court below was assigned as error.

Plaintiff claimed title under conveyances from one Jesse Denson, grantee of the land in controversy, and read a copy of a conveyance, certified by the clerk of the District Court of San Augustine county, on the 13th of April, 1871, as a “true and correct copy of the original now on file in my (his) office.” The instrument was dated October 31, 1834. It was signed by the grantor, and Benjamin Lindsay, alcalde, and two instrumental witnesses. Defendants objected to its being read, on the ground that it was not properly authenticated for record. The objection was overruled, and this ruling was assigned as error.

A witness, Roberts, the executor of Elisha Roberts, was, over the objection of defendants, permitted to testify as to the contents of a certain order and letters of Jesse Denson to Elisha Roberts, recognizing the title to Hutchins, under whom plaintiff claimed. The evidence was admitted upon the affidavit of plaintiff's attorney, that “plaintiff and affiant had made diligent search for the orders and letters of Jesse Denson to Elisha Roberts among the papers of plaintiff, where said papers ought to be, and where plaintiff and affiant believe they ought to be, and they have not found them, and affiant states that they are lost or mislaid.” Roberts testified to the former existence and loss of the papers. To this ruling of the court, also, exception was taken, and the ruling assigned as error.

The verdict, and the action of the court below in rendering

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judgment upon it, are referred to in the opinion, in which the verdict is set forth at length.

Sayles and Bassett, for appellants.—On the proposition contended for by them, that the surviving wife cannot recover in a suit brought by her alone, on a deed executed to her during coverture, with a former husband, the presumption being that the land belongs in such case to the community, cited *Owen v. Tankersley*, 12 Tex., 413; *Moffatt v. Sydnor*, 13 Tex., 628; *Holloway v. Holloway*, 30 Tex., 164, and *Hatchett v. Connor*, 30 Tex., 111.

Preston & Smith and Stuart & Barziza, for appellee, insisted that the act of sale was in due form, and was such an instrument as imported verity, and needed no other authentication to “entitle it to recordation” than it possessed, citing *Hernndon v. Casiano*, 7 Tex., 322; *Paschal v. Perez*, 7 Tex., 348; *Houston v. Perry & Williams*, 5 Tex., 462; *Smith v. Townsend*, Dallam, 569; *Hubert v. Bartlett*, 9 Tex., 97.

As to Mrs. Bacon’s right to sue, they cited *Womack v. Shelton*, 31 Tex., 592; *Watrous v. McGrew*, 16 Tex., 506; *Croft v. Rains*, 10 Tex., 520, and *May v. Slade*, 24 Tex., 207.

GOULD, ASSOCIATE JUSTICE.—The answers of the defendants, Singleton and Holder, set up that they were innocent purchasers in good faith, of part of the land sued for, from their co-defendant, A. J. Hutchins, and that they had, in good faith, made valuable improvements, for the value of which they claim judgment, in the event the plaintiff recovered judgment for the land. There was evidence in support of this plea sufficient to entitle them to have it passed upon by the jury. In the charge of the court, no allusion was made to the subject of improvements, in good faith. The jury, however, returned the following verdict: “We, the jury, find for plaintiffs, the south half of the Jesse Denson league, No 8, Spring creek, Harris and Grimes county, Texas, and give no damages for timber, &c., the present occupants to hold their improve-

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ments." On this verdict, the court rendered judgment for the half league of land sued for, which judgment concludes as follows: "And whereas there was no reference to the improvements, in the charge of the court, it is ordered that the portion of the verdict referring to improvements be regarded as surplusage."

The indefiniteness and uncertainty of the verdict was made one of the grounds of a motion for new trial, and one of the errors assigned is, that the judgment of the court does not conform to, nor is it supported by, the verdict of the jury.

The verdict was certainly not an unconditional finding for the plaintiff. If, in finding that defendants should hold their improvements, it was not intended that they should hold also the land improved, still the holding of these improvements is a condition qualifying the verdict for plaintiff. It was the evident intention of the jury that the defendants should not lose their improvements without compensation; and whilst their verdict was not such that the court could render thereon a judgment carrying out that intention, it was an attempt to respond to an issue made by the pleadings, and not unsupported by evidence, and cannot be treated as mere surplusage. "Where the jury find the issue, and something more, the latter part will be rejected as surplusage." (*Patterson v. United States*, 2 Wheat., 225.) If the pleadings had presented no issue of improvements in good faith, or if the evidence had justified the court in withdrawing that issue from the jury, the finding on that subject might have been rejected. The plea setting up that defense or claim was certainly sufficient, in the absence of exceptions, and the evidence showed that Holder & Singleton held under deeds from A. J. Hutchins, whose claim of title reached back to the sole heir of the original grantee; that they paid Hutchins for the land, and that they had, each of them, made improvements on the land, to the value of not less than \$300 each. Counsel for appellees say that the evidence clearly established that defendants acquired their title, and took possession of the land, with

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knowledge of the title held by plaintiff. However this may be as to the other defendants, the record does not show such knowledge in Holder & Singleton; and even if it did, that fact would not be conclusive that they had not acted in good faith. (*Dorn v. Dunham*, 24 Tex., 380; *Sartain v. Hamilton*, 12 Tex., 222.)

It is true, that when the court failed to submit the issue to the jury, that the defendants should have asked appropriate charges, the refusal of which would have been error. As they neglected to do this, if the jury had simply found for plaintiffs, the defendants would, perhaps, have had no right to complain. But inasmuch as the jury, though uninstructed on the subject, have nevertheless attempted to pass upon the issue, and to find on it for the defendants, the court was not authorized to disregard that part of their verdict, however informal. As returned, the verdict should not have been received; having been received, it was only a conditional finding for plaintiff, and did not authorize the absolute judgment rendered in her favor, and for this error the judgment must be reversed.

There are other questions presented by the assignment of errors, and discussed by counsel on both sides, on which it is proper that we should give our conclusions.

The plaintiff, at the time suit was commenced, was the surviving wife of A. B. Bacon, deceased, and alleged in her petition "that she is the owner, and entitled to the possession of" the land sued for, and that "she holds said land by a regular chain of title," and attached to her petition a notice of the filing of certain deeds. Amongst these was a deed from Thomas S. Bacon to herself, made whilst her husband was still living, which deed was read in evidence on the trial. The defendants asked a charge, in substance, that the presumption was that the land was community property, and that plaintiff "could not maintain a suit for it in her own name as her separate property." In support of the proposition, that the refusal of this charge was error, we are referred to the cases

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of Hatchett v. Connor, 30 Tex., 111; Holloway v. Holloway, 30 Tex., 164; Owen v. Tankersley, 12 Tex., 413; Moffatt v. Sydnor, 13 Tex., 628.)

The cases referred to will be found to be suits brought in the name of both husband and wife, or in the name of the husband alone, for the recovery of what is alleged to be the separate property of the wife, and to hold, that in suits thus brought a recovery cannot be had on evidence which shows it to belong to the community, or to be the separate property of the husband. In this case the plaintiff sued as a *feme sole*; and just as any other owner of land, or of an undivided interest in land, she alleges her ownership in general terms. As she was a *feme sole*, no averment that the land was her separate estate was necessary, and none such was made. If, in fact, she only owned an undivided interest in the land, she might have alleged such to be her title, and have maintained her suit against a wrongdoer. (Croft v. Rains, 10 Tex., 523; Watrous v. McGrew, 16 Tex., 510; Grassmeyer v. Beeson, 18 Tex., 766; and Presley v. Holmes, 33 Tex., 478.) But having sued under a general allegation of title in herself, it is not a variance if the evidence shows that she owns less than the whole, or only an undivided interest. (Dewey v. Brown, 2 Pick., 387; Some v. Skinner, 3 Pick., 62; McFadden v. Haley, 1 Bay, 457; Watson v. Hill, 1 McCord., 161; 2 Washburne on Real Prop., 2d ed., page [422,] 438.)

Another assignment of error is, to the admission in evidence of a deed (by public act) from Jesse Denson, the grantee, to Elisha Roberts, the objection, taken by bill of exceptions, which also describes the instrument offered as a deed, being, that it was not properly authenticated by any notarial act which entitled it to record. Looking at the statement of facts, it appears that the instrument read in evidence was a copy of what purported to be a deed by public act, executed in 1834, before the alcalde of the municipality of San Augustine, with two assisting and two instrumental witnesses; and that immediately following the signatures, as

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they would appear in the original or protocol of such an instrument, is the certificate of the clerk of the District Court of San Augustine county, made in 1871, that the "foregoing deed * * is a true and correct copy of the original deed now on record in my office, in book B, p. 68, records of deeds, mortgages, &c." The question discussed by counsel is, whether a *testimonio* can be admitted to record without proof of its execution—a question settled in the negative by numerous decisions of this court. (*Word v. McKinney*, 25 Tex., 258; *Lambert v. Weir*, 27 Tex., 364; *Hatchett v. Conner*, 30 Tex., 108; *Wood v. Welder*, 42 Tex., 408.)

But we see nothing in the record to make this discussion appropriate; for it nowhere appears that a *testimonio* was recorded. Indeed, there is so much of uncertainty as to what was the real nature of the instrument offered in evidence, that we feel justified in dismissing the subject, with one or two suggestions. First, if the instrument offered was a mere copy of the record of a *testimonio* or protocol, inasmuch as the land did not lie in San Augustine county, the registration there was unauthorized, however the instrument may have been authenticated. Second, it seems to us not improbable that the instrument copied by the clerk of San Augustine county is the original or protocol, which should be in his office, and which may, with other similar instruments, constitute book B of the county records. If so, and if such is the meaning of the certificate, the copy was admissible in evidence, and admissible to record in the county where the land lies. (*Paschal's Dig.*, arts. 3717 and 4984.)

The only other assignment of error discussed by appellant is, as to the admission of the depositions of Felix Roberts, testifying, amongst other things, to the contents of an order and of letters from Jesse Denson to Elisha Roberts, it being objected that no proper predicate was laid for the admission of secondary evidence. In regard to the letter, Roberts, the executor of her father's estate, and at one time custodian of the letters, proved their existence and genuineness, and their loss;

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and in connection with the affidavit of plaintiff's attorney, it would seem that a sufficient predicate was laid. In regard to the order, it seems that the contents of the letters were to the same effect, and that it was immaterial whether there was a separate order or not.

Other errors assigned were not discussed, and may be regarded as abandoned.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

S. F. GRIMES v. N. HOBSON.

1. LIEN BY LEVY OF EXECUTION.—A lien by levy of execution takes preference over an unrecorded deed from the judgment debtor.
2. SAME—REGISTRATION LAWS.—*Grace v. Wade & Mains*, 35 Tex., 522, approved, holding that an unrecorded deed is void against a creditor who has acquired a specific lien or interest in the land in controversy by the levy of an execution under a judgment in a different county from that in which the land was situated, although the judgment has not been recorded in the county; and the creditor, or any one else who might purchase the land under the execution, would get title against the unrecorded deed, notwithstanding he might have full notice of the deed, at the time of the purchase, provided the creditor had no notice prior to the levy of his execution.
3. TRESPASS TO TRY TITLE.—An action involving title to land, (under *Dangerfield v. Paschal*, 20 Tex., 537.) is, in effect, an action of trespass to try title to the land, whatever be its form.
4. FORMS OF ACTION.—The rights given to creditors by the registration laws, do not depend upon the legal or equitable form of the action in which the statute is invoked. When the purchaser, or the creditor in whose right he claims, comes within the proper construction and real import of the statute, the right conferred upon him by it, is as available in a court of equity as at law; and the one tribunal no more than the other can annul the plain provisions of the statute.
5. SHERIFF'S SALE—CO-DEFENDANT MAY PURCHASE.—The fact that land was bought at sheriff's sale, for or by a co-defendant in the execution, cannot affect the right to it, provided the creditor had a fixed lien upon the land, by levy or otherwise.

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6. PURCHASE BY CO-DEFENDANT AT EXECUTION SALE.—Such purchase in no way diminishes his liability on the judgment, either in favor of the plaintiff in execution, or of the defendant, whose land was sold, if he paid more than his share of the judgment.

APPEAL from De Witt. Tried below before the Hon. D. D. Claiborne.

S. F. Grimes brought suit, August 21, 1871, against N. Hobson, in the District Court of De Witt county. The petition set out that, October 5, 1855, in the District Court of Jackson county, a judgment was obtained for \$1,132.49, by Joseph H. Raymond, against William G. Hill, Benjamin F. Hill, and D. M. Stapp; that under said judgment, an alias execution was issued, October 4, 1858, to the sheriff of De Witt county, which execution came to the hands of the sheriff of De Witt county, October 12, 1858, and was, on the same day, levied on a tract of 1,000 acres, being the interest of defendant William G. Hill in a league of land patented to him in 1852; that under said execution, the sheriff sold said land on the first Tuesday in February, 1859, when James E. Sutton became the purchaser, for fifty dollars, the highest bid offered; and the sheriff executed a deed therefor. That said William G. Hill, on November 30, 1858, executed to defendant Hobson a deed for said land, under which he sets up claim; that the claim of Hobson, as against plaintiff, is void; but is a cloud on the title of plaintiff, and embarrasses him in the sale thereof. He asked judgment quieting his title to the land against defendant, declaring such claim void, and for general relief.

The defendant pleaded his purchase of W. G. Hill, alleging that the judgment was dormant at the time of the issuance of the alias execution under which the sale was made, through which the plaintiff claimed title.

A jury was waived, and judgment was rendered for the defendant, and annulling the sheriff's deed, &c., from which the plaintiff appealed.

The facts, as to the title, as alleged in the pleadings, were

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proven. It was also admitted that the purchase by Sutton was made for D. M. Stapp, one of the defendants in execution, and that Sutton conveyed to Grimes, the plaintiff in trust for Stapp, who furnished the money to pay the bid at the sheriff's sale.

W. R. Friend, for appellant, cited and discussed *Sydnor v. Roberts*, 13 Tex., 598; *Hawley v. Bullock*, 29 Tex., 216; *Smith v. Boquet*, 27 Tex., 507; *Robinson v. Parker*, 3 Smedes & Marsh., 114; *Paschal's Dig.*, 4983, 4988, 4994; *Hargrove v. De Lisle*, 32 Tex., 170; *Mercein v. Burton*, 17 Tex., 206; *Sayles's Prac.*, sec. 653; *Ayres v. Duprey*, 27 Tex., 607; *Bennett v. Cocks*, 15 Tex., 67; *Barrett v. Barrett*, 31 Tex., 348; *Blankenship v. Douglas*, 26 Tex., 225; 1 *Greenl. Ev.*, sec. 115; *Orme v. Roberts*, 33 Tex., 768.

Phillips, Lackay & Stayton, for appellee, cited and discussed *Rodgers v. Burchard*, 34 Tex., 443; *Orme v. Roberts*, 33 Tex., 773; *Ayres v. Duprey*, 27 Tex., 606.

October 21, 1873, the case was affirmed, Walker, Justice, delivering the opinion; Ogden, Justice, dissenting.

A rehearing was applied for and granted.

Jackson & Jackson, for the motion and on the merits of the case, filed a written argument, carefully and ably discussing the authorities.

Glass & Cullender and *W. R. Friend* resisted the motion, in a written argument; also on the merits.

MOORE, ASSOCIATE JUSTICE.—It was expressly decided by this court at its late session, at Austin, in the case of *Grace v. Wade and Mains*, that an unrecorded deed was void, by reason of our registration acts against a creditor who had acquired a specific lien or interest in the land in controversy, by the levy of an execution under a judgment in a different

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county from that in which the land was situated, although the creditor had not caused a copy of the judgment to be recorded in said county; and that the creditor, or any one else who might purchase the land under the execution, would get title against the unrecorded deed, notwithstanding he might have full notice of the deed when he purchased, provided the creditor had no notice prior to the levy of his execution. This decision is directly applicable to this case, and will require its reversal.

The action in this case, although not brought strictly under the statute, must be held, under the authority of *Dangerfield v. Paschal*, (20 Tex., 536,) to be in effect an action of trespass to try title. If the prayer to quiet title and remove cloud, can be treated as amounting to anything more than the prayer in an action in trespass to try title, it may be that the plaintiff cannot have the equitable relief prayed for, unless he shows himself ready to do equity; but to such a suggestion it will suffice to answer, that the rights given to creditors by the registration laws do not depend upon the legal or equitable form of the action in which the statute is invoked. Unquestionably, the purchaser under the judgment does not acquire title superior to that of the party holding under the prior unrecorded deed, unless either he or the creditor in whose right he claims, comes with the proper construction and real import of the statute. But when he does, the right conferred upon him by it is just as available in a court of equity as at law; and the one tribunal, no more than the other, can annul the plain provisions of the statute.

We are not to be understood as intimating that the title exhibited by appellant in this case may not be subject to question, either in a court of law or equity; for if no objection was made to it in the court below, except that decided in the case of *Grace v. Wade*, (and no others have been discussed by counsel,) it would be evidently improper for us to consider them if they were suggested to our minds by the record, which, however, we are not to be understood as intimating.

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The fact that the land was bought at the sheriff's sale for Stapp, who was one of the defendants in the execution, cannot in any way affect the question in this case; that he is also liable for the full amount of the judgment, did not deprive the plaintiff of the right to subject the property of the other defendants to sale for its payment. If it is conceded as certainly it must be, that as, between the plaintiff in execution and Hill, the levy and sale were valid, it follows, unless Stapp is forbidden to purchase at the sale, that he is entitled to claim all the rights to which Raymond, the plaintiff in execution, was entitled by the statute as a creditor. How is there anything which precludes Stapp from purchasing at the sale? It is said, in the case of *Smith v. Boquet*, 27 Tex., 514, that a defendant in execution may purchase his own property at the sheriff's sale; and certainly, if he can, we see no reason why his co-defendant may not also do likewise. If the sale were made or procured through combination or fraud, for the purpose of injuring the party complaining of it, this, of course, would present a different question. But certainly we cannot see how the bare fact that Stapp is jointly liable for the payment of the execution, will preclude him from purchasing land levied upon and sold as the property of another party, although, as one of the defendants, he is also bound for the satisfaction of the judgment.

Although the amount paid by Stapp for the land which he purchased goes to pay the debt for which he is jointly liable, it does not do so as a payment on the judgment by him, but by the defendant Hill, whose property is sold. His liability is in no way diminished by this payment. He is still liable, notwithstanding his purchase, for his full share of the judgment, either to the plaintiff or to Hill, if the judgment, or more than his part of it, has been paid by him by this sale or otherwise. And if there had been no record or other notice of appellee's deed prior to the sale of the land by the sheriff, it would seem that Stapp, by reason of his purchase and payment for the land, would have been entitled

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to the protection of the statute as a bona fide purchaser, as well as in right of the plaintiff in execution as creditor.

REVERSED AND REMANDED.

ALEXANDER EDGAR v. THE GALVESTON CITY COMPANY.

1. PLEADING—DEMURRER.—Under our system of practice, which permits the plaintiff, after giving a full statement of his cause of action, to add such allegations, pertinent to the cause, as he may think necessary to maintain his suit, a history of the facts out of which plaintiff's rights are supposed to grow, is often given, which may embrace several causes of action, perfectly or imperfectly stated, with prayer for alternative relief. When such a petition is excepted to, in such way as to test the plaintiff's right, under every aspect of his case, to any of the relief prayed for, it is the duty of the court—

1. To ascertain what combination of facts can be found stated in the petition which will constitute a cause of action, responsive to the prayer for general relief, or to any prayer for special relief.

2. To sustain the petition as containing a good cause of action, if such a combination of facts can be found stated, though all the other facts stated may be liable to the exceptions taken, and must thenceforth be treated as surplusage.

3. To sustain the petition only when the facts stated, giving a cause of action, stand in consistent harmony, when separately and conjointly considered, in connection with other facts stated.

2. APPROVED.—*Edgar v. The Galveston City Company*, 21 Tex., 302.

3. TRESPASS TO TRY TITLE.—The plaintiff's right to bring a second suit in trespass to try title exists, whether the first suit was adjudicated on the verdict of a jury or on demurrer; the law is construed according to its spirit, in order to embrace a case that is wanting in one of the incidents mentioned in the statute, though embodying the substance of what the statute requires, and coming within the object evidently contemplated in its enactment.

4. TRESPASS TO TRY TITLE—PLEADING.—See opinion, for facts stated in a petition which constitute a good cause of action in trespass to try title.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

This was a suit for the league of land on which the city of

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Galveston is situated. A first suit by the same party was before this court; and the judgment of the court below, sustaining a demurrer to the petition, was affirmed by this court. (21 Tex., 302.)

This was a second suit, brought March 24, 1859, upon the same allegations of facts, substantially as the first, so far as it sought the recovery of said league of land, which were, in substance, that Edgar, with his family, emigrated to Texas in 1835; settled as a colonist in Austin's colony; was a citizen at the date of the Declaration of Independence; was a soldier in the Texas army; that he was entitled to a league of land as a headright; that in April, 1836, he settled on the east end of Galveston island, and improved about twelve acres of land, with a view to a title to his headright league, including the same, to which he claimed right by virtue of the act of the Consultation, and of the Constitution, and of the general land law of the Republic; that certificate for a league of land was issued to him February 3, 1836, and was approved by the traveling board; that Galveston county was created May 15, 1838; that on the 8th of July, 1839, he placed his certificate in the hands of the surveyor of Galveston county, to be surveyed, to include his said improvements; but owing to the want of courts and the neglect of the surveyor and officers of the Government, but without fault or neglect on his part, no survey was made; that in May, 1840, during his absence from the city, Gail Borden, agent of the Galveston City Company, obtained the possession of his said certificate, by a transfer thereof from his wife and one Walbridge, acting as his agent, for city lots, then of the value of \$28,295, a part of which were conveyed to Walbridge, and for the remainder the company gave certificates of sale to his wife; that he had been willing, and a few days before agreed, to convey his certificate and claim to said league of land for the above lots, and, in addition thereto, for a thousand dollars in cash, and two lots with wharf privileges, but he never authorized or ratified the above sale, but rejected and denounced

it, and that no deed had ever been made to Mrs. Edgar or himself; that on account of his poverty, until May, 1842, he could not bring suit, which he then did, to recover said league of land; that the demurrer was sustained to his petition, and in 1858 the Supreme Court affirmed the judgment, and he again brought suit March 24, 1859.

By way of replication to the answer, setting up a legislative grant of said league and labor of land to M. B. Menard, by an act of the Congress of the Republic of Texas, passed December 9, 1836, and a patent to the same, by the President of the Republic, January 25, 1838, the petition alleged that Menard did not pay for the land, and that he and White defrauded the State. The petition contained an independent allegation of ownership of the league of trespass and wrongful possession thereof by defendants, and a prayer for judgment, restoring the property, with damages for its detention.

The petition also prayed, 1st, for the recovery of the league of land; or, 2d, for a good title for the lots conveyed to Walbridge, and for which certificates of sale were given his wife, alleged to be of the present value of \$200,000; or, 3d, for damages, to the amount of \$200,000; or, 4th, generally, for such judgment as his case entitled him to.

Demurrer to the original and amended petition, setting forth the grounds thereof very fully; also special demurrer to such parts of the petition as sued for alternative special relief, were filed by the defendant and sustained by the court; from which ruling of the court below, this appeal was prosecuted.

Spencer & Stewart, for appellant, cited, with reference to the action of the court on the demurrer, *Graham v. Vining*, 1 Tex., 672; *Warner v. Bailey*, 7 Tex., 519; *State v. Williams*, 8 Tex., 264; 10 Peters, 264; 2 Johns., 465; 3 Johns., 366; 11 Johns., 482; 3 Cranch, 229; *Williams v. Randon*, 10 Tex., 77; *Zacharie v. Bryan*, 2 Tex., 276. On the subject of plaintiff's right to his second action, they cited *Dangerfield v.*

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Paschal, 20 Tex., 536, and insisted that it was not controlled by *Hughes v. Lane*, 25 Tex 356. On this subject they said: "The case of *Dangerfield v. Paschal*, 20 Tex., interprets the statute according to its spirit, and allows the plaintiff the benefits of his second action, although there was no 'verdict' of the jury. And although the case of *Hughes v. Lane*, 25 Tex., at first blush, might seem to favor an entirely rigid, inflexible, and literal construction of the word 'verdict' in the statute, yet from a close inspection of that case, that it was one in which the plaintiff, by his own gross negligence, had failed to file the record in the Supreme Court in time; and the defendant filed the record and had an affirmance of the judgment; and afterwards, when the plaintiff filed, on writ of error, the record, the cause was dismissed by the Supreme Court, because the plaintiff had neglected to give any notice of appeal; and when we look at the said case, it is manifest that the result of the decision was right, but the dicta and reasoning employed were extra-judicial, and not at all necessary to the decision of the case. And while we recognize the force of the maxim, *stare decisis*, and venerate the judicial fame of the distinguished judge who delivered the opinion in the case of *Hughes v. Lane*, if it is considered as deciding that none other than a judgment upon a verdict entitles a plaintiff to his second action, then we would most respectfully suggest the propriety of its not being regarded as having established a precedent not to be modified."

Ballinger, Jack & Mott, for appellee.

I. The appellant has no cause of action to recover the league of land sued for, on which the city of Galveston is situated.

The case of *Edgar v. The Galveston City Company*, 21 Tex., 302, was elaborately argued, and a full and careful decision made on all its points by the court, Chief Justice Hemphill delivering the opinion of the entire bench, including Justices Wheeler and Roberts.

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(Counsel, after invoking attention to the syllabus in that case, continued:)

That Galveston Island, not subject to colonial settlement throughout the period that it remained, under the Mexican Government, a military post and place of refuge for fugitives from Mexican invasion during the War of Independence, did not become a part of the public domain, within the purview of any of the contemporaneous laws upon which a soldier of the Republic, taking refuge or even performing service there, could improve the occasion to obtain a preference, a pre-emption, a location upon it of his headright league of land,—is a proposition which we do not think can now be shaken.

But even if this were not so, the power of the sovereign Government, as against this mere locative preference, to withdraw any particular locality from the exercise of the right, or to make disposition or sale of it, is settled, not only between these parties, (in 21 Tex., 302,) but is the settled law of this court, (*State v. Delesdenier*, 7 Tex., 76; *Smith v. Taylor*, 34 Tex., 607, and of all American courts. *Wilcox v. Jackson*, 13 Peters, 498.)

The preference right of plaintiff, even if it once existed, was expressly limited to the period of six months. Says this court: "Had there been no previous title, he should have located within the six months; and title having been issued to Menard, he should, within that time, have filed his certificate and application, otherwise he could not have the shadow of a pretense to contest Menard's title, by virtue of his claim to the preference right, under his improvements. He did not file his certificate for location until seventeen months after the opening of the land office, and had then forfeited his claim to the land, if any he ever had." (21 Tex., 332.)

II. The case is of that class, above all others, in which courts recognize their duty to adhere to a decision which has become a rule of property to a community. The decision of the court, made seventeen years ago, became a rule of prop-

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erty to a community then of about three thousand persons, but which has since increased to thirty thousand, spreading over the territory, the title to which was settled.

The court will not overturn a well-considered decision, where valuable rights and interests have become vested under it, although they may consider it to be erroneous. (Ram on Legal Judgment, ed. 1871, 237.)

It is important that, when a question of this kind has become once settled, it should not be disturbed, for it grows into a landmark of property. (Kent., C. J., 6 Johns., 54; *Beauregard v. City of New Orleans*, 18 How., 205.)

III. A first suit, on which a demurrer by the defendant is sustained, does not stop limitation, which continues to run until the second suit. (*Hughes v. Lane*, 25 Tex., 356.)

The plaintiff's petition in this suit was filed March 24, 1859. It alleges his peaceable and continuous possession of part of the land claimed by him from 1836 to the present time. He is not disturbed, and seeks no relief as to that part of the premises; but he shows that the Galveston City Company, in May, 1842, took adverse possession of all the remainder of the league, and has ever since occupied and held it. A lapse of seventeen years would bar any right of action he could have possessed. This ground of demurrer is specially relied upon.

IV. The petition contains an alternative prayer, that the City Company make to plaintiff a title to certain lots, part of which, he says, were conveyed to his agent, Walbridge, and a part to his wife—certificates of purchase having been issued to her, instead of deeds. This took place in 1840.

1st. This part of the case was specially demurred to, because repugnant to the entire claim and conduct of plaintiff. He says, he then and ever since rejected and repudiated the transaction. He cannot now claim this interest. 2d. His wife and Walbridge, or claimants under them, are necessary parties to any such action. 3d. Because, what has become

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of the certificates of sale, or lots, is not shown. 4th. Limitation from the year 1840, to December, 1873.

V. To the case for two hundred thousand dollars damages, defendant demurs, that no sufficient cause of action is shown, and that the demand, originating, if at all, in 1840, was barred in 1859, or rather in December, 1873, when first sued on.

VI. The plaintiff alleges that his certificate has been patented; but the action is not for the recovery of the land covered by the patent—the location, present condition, or any facts relating to which are not attempted to be shown. If damages of any kind or amount were suffered by plaintiff to be embraced in his general prayer, they arose in 1840 or 1842, and are barred by limitation, which is set up by demurrer.

VII. Plaintiff shows that his wife and his agent, Walbridge, received for his league certificate property from the City Company, then of the value of \$28,295, now worth \$200,000. He cannot sue to revoke this transaction, or affect it in any shape, without restitution of what was received; or, certainly, without much fairer explanation than is given to excuse him from that obligation.

ROBERTS, CHIEF JUSTICE.—In 1840, when the common law was adopted as our fundamental system of jurisprudence, it was provided, that “the proceedings in civil suits shall, as heretofore, be conducted by petition and answer.” (Paschal’s Dig., art. 979.) Subsequently it was thought proper to give directions, in framing a petition, requiring that it “shall set forth clearly the names of the parties, and their residence, if known, with a full and clear statement of the cause of action, and such other allegations, pertinent to the cause, as may be deemed necessary to sustain the suit, and also a full statement of the nature of the relief he requests of the court.” (Act of 1846, Paschal’s Dig., art. 1427.) Under the guidance of these rules, we often find a petition to contain a historical statement

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of the facts, out of which the rights of the plaintiff have grown, which may embrace several causes of action, either perfectly or imperfectly stated, resulting in a prayer for several alternative reliefs. The defendant, being also allowed in his answer "to plead as many several matters, whether of law or of fact, as he shall think necessary to his defense" to such a petition, will most likely except, in such way as to test the legal competency of every fact and combination of facts, to produce the varied and numerous results prayed specially for in the petition, or which may be properly attained under the general prayer for relief, which is usually inserted at the close of the petition. Upon a hearing of such exceptions, the court is required to ascertain what combination of facts can be found stated in the petition and in its amendments, which will constitute a cause of action responsive to any of the special reliefs prayed for, or to the general relief in the prayer of the petition. If such a combination of facts stated can be found, the court must sustain the petition as containing a good cause of action, although three fourths or nine tenths of its allegations are liable to the exceptions taken to them, and must thenceforth be treated as useless surplusage. It is not to be understood, however, that the statements of the facts can be distorted from their true meaning and purpose, as used in the petition, and abstracted from their proper connections with other facts stated, to accomplish this object; but, on the contrary, they must be of such a character as to stand in consistent harmony when separately and conjointly considered. (*Whitlock v. Castro*, 22 Tex., 113; 30 Tex., 21.)

Such is, practically, our system of pleading, and such a case is the one now under consideration.

The objects of this suit, as indicated by the alternative reliefs prayed for, are, the recovery of a league and labor of land, embracing the Galveston city league, upon the eastern end of Galveston island, with damages; or, the headright certificate of Edgar, located upon said land previous to 1842; or, the alleged value of said certificate, by reason of its con-

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version at that date; or, a title to the lots, alleged to have been fraudulently traded to Mrs. Edgar for said certificate at said time.

The exceptions, and especially those which set up the statutes of limitation, were taken to the facts of the petition, upon which all of these reliefs were predicated, except the first, which was the recovery of the land. And they were well taken as to those facts, relating to the recovery of the land, by reason of Edgar's immigration in 1835; his selection and settlement in April, 1836; his subsequent improvements and the filing of his headright certificate upon it in July, 1839. That was settled in the decision of the previous suit by this court, and we have no desire to reconsider the positions taken in the elaborate opinion of Chief Justice Hemphill, then delivered. (*Edgar v. The Galveston City Co.*, 21 Tex., 327.)

In the original petition, we find the following: "And your petitioner further shows unto your honor, that besides the above and foregoing, he is otherwise the legal owner in fee simple of the league and labor of land lying and being situate on the east end of Galveston island, in the county of Galveston, commonly known as the city league, and on which is located the city of Galveston, and that the said league and labor of land aforesaid, being so in the lawful possession of your petitioner, and he the owner thereof, the said defendants did, on the first day of May, 1842, with force and arms, enter thereupon, and dispossess your petitioner, and have ever since forcibly held, and do now forcibly hold and detain the same, and refuse to yield or surrender possession thereof to your petitioner; all of which is to the damage of your petitioner of one hundred thousand dollars."

In the amended petition, we find the following description of the land sued for: "The league and labor of land mentioned in the petition, and in this amended petition, is the same which defendants claim, and is commonly called by the name of Galveston city league and labor, and begins at the most eastern point or eastern extremity of Galveston island,

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and thence runs in a westwardly and southwestwardly direction, with the course of the gulf beach, to the southeast corner of what is called lot No. 1, in section No. 1, according to the survey of Galveston island, known as Trimble and Lindsay's survey; thence with the east boundary line of said section No. 1, in a northerly direction, across the island to the northeast corner of lot No. 10, in said section No. 1; thence in an easterly direction, following the meanderings of Galveston bay, to the place of beginning, containing one league and labor of land."

Amongst the numerous prayers, we find the following prayer, in the original petition:

"And your petitioner prays for the judgment and writ of your honorable court, to restore him to the possession of said league and labor of land, and for all damages for the detention of said property, and costs."

These parts of the petition exhibit a good cause of action, and must be so held, unless the petition contains other allegations that constitute a defense to it. In searching through the various allegations of the petition and amended petition, to ascertain whether or not plaintiff has stated facts enough to make out a defense to his action in favor of defendants, a distinction must be made between what is stated in the nature of a replication to and by way of the denial of the validity of the defenses set up in the answers of the defendants, and what is stated by way of explanation, incidentally, of his cause of action, which, when pertinent, is permitted by the statute that has been quoted.

Plaintiff's allegations of defendant's possession of the land since 1842, holding under a title from the Government, through Menard, is thus qualified by the allegations, that said title is fraudulent and void in the replication to defendant's answer, and also by his allegation that he has been in the peaceable possession of said land during that whole time, and he fails to show any other facts that might be necessary to

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give the defendants a title to the land, under any section of the statute of limitations.

So, too, the plaintiff admits that this is a second suit for the same land, and that a judgment final was rendered against him in favor of the defendants in the former suit. But these facts are admitted, with the qualification involved in the allegations made in the same connection, that the former suit was to recover the same land, and contained similar allegations in many respects, and that upon exceptions thereto, judgment was rendered against him in favor of the defendants, which judgment was affirmed by the Supreme Court, and that in less than twelve months thereafter, this suit was brought by him against the same defendants to recover the same land.

If the statute of our State does not allow a second suit upon the same cause of action, under the circumstances thus set out by plaintiff, what he has stated amounts to the admission of a bar to his action by a former recovery, and would prevent his pleading, taken all together, from presenting a good cause of action.

We are of opinion, however, as stated by Justice Lipscomb, that the object of the statute was to allow the plaintiff to have two trials upon the merits. (*Dangerfield v. Paschal*, 20 Tex., 541.) In the case just cited, the judgment in the first suit was not rendered upon the verdict of a jury as literally prescribed by the statute, but by the finding of the court upon a demurrer to the evidence; still the Supreme Court held, that the plaintiff was none the less entitled to bring a second suit within twelve months, as though the judgment had been rendered upon the verdict of the jury.

Certainly a judgment of the court, founded on the verdict of the jury, is as complete a bar in ordinary cases, on the principle of *res judicata*, as a judgment on demurrer can be. One is for the lack of sufficient facts proved, and the other for the lack of sufficient facts alleged, and both are equally judgments upon the merits of the case, as presented on the trial.

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The law is construed, according to its spirit, in order to embrace a case that is wanting in one of the incidents mentioned in the statute, though embodying the substance of what the statute requires, and coming within the object evidently contemplated in the passage of the act. (Paschal's Dig., arts. 5298, 5299.)

In the action of ejectment, any number of suits might be brought in succession between substantially the same parties and for the same land. Our statute, in abolishing the fictions of said action, and substituting trespass as the form of action for the trial of title to land, gave the plaintiff two suits, one after the other, and provided that he should not be precluded and barred by the first one, although he had had a trial of his right, in the fullest and most complete mode known to the law, by a verdict of the jury, and judgment of the court thereon against him. It is not reasonable that it ever could have been contemplated by the Legislature, in passing this law, that he should be precluded and barred by a less full and less complete mode of trial of his right by a judgment of the court against him upon demurrer to the pleadings, or to the evidence, or upon submitting the case to the court upon the law and facts, without a jury.

We are of opinion, therefore, that the petition contains a good cause of action for the recovery of the league and labor of land, with damages for the detention and holding of the same as prayed for. The alternative claim for a title to certain lots, is not presented with appropriate averments, showing any right, with that fullness and certainty that would justify a recovery. The alternative claim for the certificate itself, as personal property, is defeated by plaintiff's own allegation, that it has been merged into a patent. The alternative claim for damages, for the wrongful conversion of the certificate, as shown in the petition, has long since been barred.

The exceptions of the defendants were well taken to these alternative claims, as well as to the title to land by mere

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immigration, selection, settlement, improvement, and filing of certificate on the land, as before indicated, which leaves standing, as a good cause of action, the formal action of trespass for the land, the constituents of which have been copied in this opinion. It is probable that they were inserted in the petition, to secure a trial by a jury, and to prevent this suit from being dismissed upon exceptions, as the former suit was.

If it be true that the plaintiff has a title to the league and labor of land, as he alleges, "besides the above and foregoing"—meaning thereby the one dependent upon the facts specially set forth in his historical statement—it is proper that he should have an opportunity to submit it to a jury of the country, under the direction of the court, as in other cases.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN THOMAS v. H. M. MOORE ET AL.

1. COLONIZATION LAWS—ALIENATION.—The colonization law of March 24, 1825, did not prohibit a conveyance of land acquired by a colonist, after the expiration of six years from the date of the colonist's title.
2. COLONIZATION—ALIENATION.—A colonist, who acquired land as such, under the colonization law of 1823, was permitted to alienate the same at any time after receiving the grant.

APPEAL from Grimes. Tried below before the Hon. James R. Burnett.

Boone & Goodrich, for appellant.

Tilman Smith, for appellees.

GOULD, ASSOCIATE JUSTICE.—On August 7, 1824, Isaac Jackson received a grant for a league of land in Austin's colony, and on November 3, 1831, he executed his bond to

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make title to the same to John W. Hall, "so soon as the laws of the land will permit or authorize the same to be done." Appellant contends, that at the date of this bond, Jackson was prohibited by law from alienating his land, and refers to *Hunt v. Robinson*, (1 Tex., 748,) and other similar cases, as supporting his position. The construction of the colonization law of Coahuila and Texas, enacted March 24, 1825, has been, that the prohibition against a sale ceased at the expiration of six years from the date of the colonist's title. (*Desmuke v. Griffin*, 10 Tex., 115; *Clay v. Cook*, 16 Tex., 73; *Atkinson v. Bell*, 18 Tex., 478; *Clay v. Clay*, 26 Tex., 29.) As more than six years had elapsed after the issuance of title to Jackson, at the time of his sale to Hall, he was not prohibited from selling, even if the restraints on alienation, imposed by the colonization law of 1825, applied to colonists who had received titles under former laws. Jackson, however, received his title under the colonization law of 1823, and, under that law, it has been held, had the power of alienation at any time after receiving the grant. (*Portis v. Hill*, 14 Tex., 71; *Emmons v. Oldham*, 12 Tex., 27.) In the long line of decisions on this subject, some of which have already been cited, no case can be found supporting the proposition that Jackson, holding, as he did, under a grant issued on August 7, 1824, was, on November 3, 1831, more than seven years thereafter, prohibited from alienating his land. (See *Robbins v. Robbins*, 3 Tex., 497; *Spillers v. Clapp*, 3 Tex., 498; *Hunt v. Turner*, 9 Tex., 385; *Burleson v. Burleson*, 11 Tex., 2; *Box v. Lawrence*, 14 Tex., 555; *Emmons v. Oldham*, 12 Tex., 19; *Harris v. Hardeman*, 15 Tex., 468; *Johnston v. Smith*, 21 Tex., 725; *Moore v. Ballard*, 24 Tex., 151; *Williams v. Chandler*, 25 Tex., 10; *Ledyard v. Brown*, 27 Tex., 404.)

As the sale by Jackson was legal and valid, without subsequent ratification, the charge of the court on the subject of ratification becomes immaterial.

What has been said disposes of the only questions dis-

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cussed by counsel for appellant, and, in regard to other questions presented only in the assignment of errors, it is deemed sufficient to say, that we have found no error calling for a reversal of the cause.

The judgment is affirmed.

AFFIRMED.

THE CITY OF GALVESTON V. THE GALVESTON CITY R. R. Co.

1. **CONSTRUCTION OF CONTRACT.**—An obligation by the railroad company, that it “shall at all times keep the road-bed of said railroad in good repair, and shall keep said road-bed up to the level of the streets; in no case shall said road-bed be above or below the city grade of the streets, after said streets shall have been graded by the city,”—does not oblige the railroad company to fill up the streets beneath its track, so as to keep its road-bed on a level with the street on each side of the track.
2. **SAME.**—Such obligation merely required the road to be kept in good repair, and did not bind the company to contribute to the expense of grading the streets, but merely to conform to and keep the level of the road-bed to that of the streets, when graded.
3. **RELEASE BY CITY COUNCIL.**—It is competent for a city council, when a charter authorizes a railroad company to build the road “under such conditions and ordinances as the mayor and aldermen of said city may provide and require,” to release the railroad company from an obligation “to construct and keep in good repair all cross-culverts whenever the same may be required under their rail-tracks.”
4. **SAME.**—Both parties having acted upon an ordinance, is sufficient reason for its support.
5. **ESTOPPEL—VOLUNTARY EXPENDITURE.**—The voluntary labor and expenditure by a city upon a work, the performance of which, by the railroad company, had been released, without calling upon the company to do the work, will not sustain an action, by the city, for labor and expenditure which were voluntary, even if the release by the city was without consideration.
6. If a contract has been obtained by mistake, or if through change of circumstances it is deemed to operate oppressively, an agreement to make an additional compensation, or to annul or modify it, is not invalid for want of consideration.

Statement of the case.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

The city of Galveston, on the 24th day of May, 1866, made a written contract with certain parties named therein and their successors, under which the Galveston City Railroad Company was organized and operated. An act of the Legislature was passed, approved October 8, 1866, by which the company was duly incorporated, in accordance with the provisions of said contract. Said act of incorporation, among other things, provided that "said company shall construct, equip, and run said railroad upon the streets within the limits of said city, under such conditions and ordinances as the mayor and aldermen of said city may provide and impose."

Articles XIII and XV were the basis of the action. Article XIII is as follows: "Said party (meaning the City Railroad Company) shall at all times keep the road-bed of said railroad in good repair, and shall keep said road-bed up to the level of the streets. In no case shall said road-bed be above or below the city grade of the streets, after said streets shall have been graded by the city."

Article XV is in the following language: "Said party (meaning the company) shall construct and keep in good repair all cross-culverts, whenever the same may be required under their rail tracks—said culverts to extend across the street from sidewalk to sidewalk; and whenever said party shall neglect to construct and keep in order said culverts, the city shall have the right to cause said culverts to be made or repaired at the expense of said party; and in the event of their refusal to pay the same, the amount shall be recoverable before any court of competent jurisdiction, for the benefit of the city."

The company constructed its tracks along several streets, indicated in the agreement, and had since used and operated the same for the purposes of its organization.

On the 8th of November, 1873, the city of Galveston filed this suit against the company, alleging breach of contract on

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the part of said company, in having neglected to comply with the terms and conditions of said XIII and XV articles of said contract. The special breaches of contract set up in the petition were, that the defendant failed and refused to fill up to the proper grade certain portions of its road-bed, and to construct certain culverts beneath the same, the necessity for which was great; that the city, by reason of such default, was compelled to and did fill up said road-bed and construct said culverts, at the cost of \$5,894.85, for which a recovery was sought.

The defendant pleaded, 1st, general denial; 2d, no liability for the amount claimed; 3d, no notification or demand before suit; 4th, no liability under the contract for the work alleged to have been done; and 5th, release by operation of subsequent ordinance or contract on the part of the city.

By agreement of counsel, the questions of labor and material and the cost thereof were specially reserved for reference to an auditor or master, in the event the law of the case should go against the defendant.

A jury was waived, and the issues of law and fact submitted to the court, which gave judgment for the defendant, from which judgment the plaintiff appealed.

The question presented by the record was, whether the City Railroad Company is liable to the City of Galveston, under article XIII and XV of their contract, for the expense incurred by the city in filling up certain portions of the road-bed of the company, and constructing certain culverts beneath the same. This statement is adopted from the brief of appellee, and is full.

Walter L. Mann, for appellant.

Ballinger, Jack & Mott, for appellee.

MOORE, ASSOCIATE JUSTICE.—The only questions which we are called upon to decide in this case, by the record now before us, as counsel for both parties agree, are, whether the

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City Railroad Company is liable to the city of Galveston for the expenses incurred by the city in filling up certain portions of the road-bed of said railroad company, and constructing culverts beneath the same, under articles XIII and XV of the contract of May 24, 1866, under which said Galveston City Railroad Company was organized, and its road constructed and operated.

Appellant insists, that by art. XIII of this contract, appellee was bound to fill up the streets beneath its track, so as to keep its road-bed on a level with the street, on each side of the track; that by the words "road-bed" and "streets," as used in said article, the contracting parties evidently intended to refer to distinct and separate parts of the streets upon which said road should be constructed. Unquestionably, if it is conceded that the word "street," as used in this article of the contract, does not include or refer to the entire street, but two lateral portions of it, separated by the railroad of said company, it cannot be denied that appellee is bound to keep the ground occupied by its track on a level with the "streets," after they are graded by the city. But to assume that these words were thus used, while admitting, as counsel does, that "the 'road-bed' was physically a part of the 'street,'" is to beg the question in issue. The plain import and evident purpose of this article, whether considered by itself or in connection with other parts of the contract, neither requires or admits of the construction given by appellant's counsel to this article of the contract, or to these words, from which he attempts to deduce it.

It was evidently the purpose of the city to require the company to so construct and keep its road, as to interfere as little as possible with the use of the streets by the general public. Hence it was stipulated, that the road-bed should be kept, at all times, in good repair, and up to the level of the streets. And in view of the fact that the city might find it necessary or desirable, from time to time, in the future, to increase or diminish the level or grade of the streets on which

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the road might be constructed, it was further stipulated, that in no case should the road-bed be above or below such grade, after the street had been graded by the city—thereby clearly showing, we think, that it was not intended by this article of the contract to require the company to contribute to the expense of grading the streets, but merely to conform to and keep the level of its road-bed to that of the street when graded.

If it had been intended that the company should bear the expense of grading that part of the street occupied by its track, evidently other stipulations would have been made than those found in this article. Waiving comment upon the fact that the obligation of the company to fill or cut down that part of the street occupied by its track, if it exist, is a mere inference from its obligation to keep its road-bed to the level of the streets after they are graded by the city, it is obvious that the city could not have left it to the discretion of the company how or with what character of material the part of the street occupied by the road should be filled, consistently with its evident purpose and duty, of merely permitting the use of its streets by the company, subordinate to its will and general plan of government. Evidently, the city might deem it necessary that some of its streets should be graded with much more expensive material, and in a much more substantial manner than others; or experience might demonstrate the necessity for the use of a different material from that with which it might have been first filled; yet there is no stipulation that the company shall be bound further than to keep its road-bed to the level of the city grade. Could it do this with any material it should select, without regard to that used by the city in grading the other parts of the street? It can hardly be conceived that there would be no reference whatever to so important a matter, if it had been intended or supposed that by this article the company had undertaken and bound itself for the performance of a

matter of such pecuniary moment and general interest, both to the company and the city.

The language of article XV of the contract is plain and unmistakable. It requires the company to "construct and keep in good repair all cross-culverts, whenever the same may be required under their rail-tracks." As to this, there is no dispute; but while the company was required by the original contract to construct and keep these culverts in repair, they were subsequently relieved by the city from this undertaking, by an ordinance, in almost as plain and unmistakable terms as the original contract. That such is the obvious import of this ordinance, is not denied by counsel for appellant. It is insisted, however, that it is inoperative and void for want of consideration. But if we were to concede that the city received no valuable consideration for it, we do not perceive how it could affect this case. Certainly the city, if it saw fit to do so, might release the company from the performance or fulfillment of an undertaking such as this, which, at the time of the release, was altogether *in futuro*, and upon which, therefore, there had been no default. If a contract has been obtained by mistake, or if, through change of circumstances, it is deemed to operate oppressively, an agreement to make an additional compensation, or to annul or modify it, is not, as is well settled, invalid for want of consideration. (1 Dillon on Municipal Corporations, sec. 398.)

The charter of the company authorized the building of the road "under such conditions and ordinances as the mayor and aldermen of said city may provide and impose." Certainly, the construction and operation of the road, under the conditions provided and imposed by the subsequent ordinance, is as valid and binding upon the city and company as by the original ordinance under which the company was organized. Both parties having acted upon the ordinance, this is a sufficient consideration for its support; and appellant, having made the culverts without calling upon appellee to do so, is estopped from demanding payment for its volun-

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tary labor and expenditures, if said ordinance was, in fact, without consideration.

There being no error in the judgment, it is affirmed.

AFFIRMED.

ISRAEL WORSHAM ET AL. V. A. RICHARDS ET AL.

1. JURISDICTION—COUNTY SEAT—COUNTY COURT.—As the statute has required the application to remove a county seat, to be made to the County Court, and they are to determine whether it has been made by a majority of the registered voters of the county, and to order the election and give notice thereof, it may be inferred that the Legislature intended to confide to the County Court the investigation and determination of all the other facts necessary to a fair and legal election.
2. COUNTY COURT—JURISDICTION.—The members of the County Court must be organized as a court, under the law, before their conclusions can be received and acted on as the judgment of the court.
3. COUNTY SEAT—PARTIES.—The citizens of a county have no such legal right, in the locality of a county seat, as will enable them to bring a suit to prevent a change of it by the authorities appointed by law to act on that subject.

APPEAL from Montgomery. Tried below before the Hon. James Masterson.

N. Hart Davis, Joseph Boone, and J. R. Peel, for appellants.

L. A. Abercrombie, for appellees.

(The written arguments on both sides were exhaustive, but related chiefly to the interpretation of the statutes on the subject involved, and are omitted on account of their length.)

ROBERTS, CHIEF JUSTICE.—Notwithstanding several acts have been passed, and constitutional provisions have been made, as well as numerous decisions have been rendered,

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upon the subject of the removal of the county seat of a county, it still seems to be a subject of difficulty whenever it arises in the courts. This originates mainly from the incompleteness of the statutory provisions relating to it. (Hart. Dig., 167-8; Paschal's Dig., arts. 1067, 1068; Laws of 1873, p. 194; Laws of 1874, p. 187; Constitutional Amendment, in Laws of 1874, p. 234, and Const. of 1876, sec. 55, art. III.) They do not specify who shall declare the result of the election, but say, that "the result of said election shall establish the seat of justice, in accordance with the provisions of the first section," &c. They provide, that it shall require the vote of two thirds of the qualified voters of the county to remove the county seat: *Provided, however,* That "if in any county, the county seat shall have been established at a greater distance than five miles from the centre of said county, a majority of all the votes cast shall be sufficient for its removal: *Provided,* Such removal shall be within the limits of five miles from the centre of said county;" and do not provide how the distance of the places voted for from the centre of the county shall be ascertained. If there should be any dissatisfaction as to the mode of conducting the election, there is no mode of contest provided, as in the election of officers. (Acts of 1873, p. 67.) The Constitution has provided that the Legislature shall pass no special law upon the subject. It is made the duty of the County Court to order the election, and give notice of it, which is to be conducted in the same manner as elections for State and county officers. By the law in force, election returns were made to the presiding justice of the county, who was required to "open them and estimate the result," and deliver a certificate of election to the candidate for whom the greatest number have been polled in the case of a county officer. This duty is ministerial or clerical, and requires nothing to be determined by him beyond a computation of numbers. The computation and result are recorded in a book, and stand as the evidence, in his office, of the election; and the cer-

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tificate, delivered to the successful candidate, is his evidence of his election. In the election for a county seat, the same computation can be made and recorded, exhibiting the result in the office; but there the application of this law ceases, for there is no person to whom a certificate of election is to be delivered; and the centre of the county, and the respective distances of the different places from it, are to be ascertained, in order to apply the rule, prescribed in the statute, of a majority of the votes in one case, and two thirds in the other, in determining which place has been selected as the county seat. These matters require investigation and the exercise of judgment; and there are no specific directions in the law as to how, or by whom, they shall be determined, and how the result of them shall be declared authoritatively. The result of the election, as computed and recorded in the office, cannot establish the seat of justice, without these other facts being ascertained and applied to them. It would seem to be proper, also, in so important a matter, that there should be a declaration, by some proper authority, placed on record, of the state of the votes and the other facts, with the conclusion drawn from all of them together, and the name of the place thereby selected. The power to perform these things, which are necessary to determine the result of the election, but which are not expressly required of any one, must be derived by implication, whether held to belong to the presiding justice or to the County Court.

As the statute has required the application to remove a county seat, to be made to the County Court, and they are to determine whether it has been made by a majority of the registered voters of the county, (which, now that there is no registration, becomes an important investigation and determination,) and are required to order the election, and give notice thereof, it is not unreasonable to infer, that the Legislature intended to confide to the County Court, the investigation and determination of all the other facts necessary to a fair and legal election. Its general powers are more adequate to

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such a task than are those of the presiding justice, while acting under the ministerial authority to which he is confined in the general election law, that has been referred to, which simply requires him to receive and open the returns, count and record the votes, and deliver the certificate to the candidate for whom the highest vote has been cast. There is no discretion allowed him, even if he were satisfied that such candidate, by stuffing the ballot-boxes, or other frauds, had been returned as having twice as many votes as there were voters in the county. In such case, the law has provided a remedy in a contest of the election in the District Court of the county. No such remedy has been provided for a contest of the validity of the election for a seat of justice, if this election law is the only power granted in reference to the manner of conducting the election, and is to be literally carried out. As far as practicable, the presiding justice may compute and record the vote; but as there is no one to receive a certificate of election, his duty is at an end, and the law is wholly inadequate to accomplish the object contemplated. There is no objection seen to the presiding justice performing this duty to the extent required by the election law, which is, to compute and record the vote as returned to him; but to let that stand as the evidence of the result to be acted on in all cases, would make the place of the county seat depend upon what part of the county could get up the greatest number of fraudulent or fictitious votes. In the event such a thing should be attempted, the County Court would be an appropriate tribunal to determine the result of the election, after an investigation of the facts relating to it.

Again: the facts to be ascertained—such as finding the centre of the county, and the distances from it to the places voted for—may require expenses to be incurred, which the County Court alone is competent to order to be paid. Further, the County Court is a sort of legislative body for the regulation of county affairs; and as this question of county seat has always heretofore been held by the courts of this State to be

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a political one, it is reasonable that the Legislature should intrust so important a matter to the County Court, rather than to one member of that body—the presiding justice. This has been rendered still more appropriate, if not absolutely necessary, by the Constitution having taken from the Legislature any power to control the question of county seat by a special law. As long as the Legislature could be appealed to for its action, any difference between the presiding justice and a majority of the County Court, might readily be settled. As the Legislature now cannot act in it by special law, and as there is no mode of contesting the election, it is proper that the power to have the law carried out should be confided to that tribunal, a majority of whose members control, generally, the affairs of the county, if for no other reason, to prevent such confusion and uncertainty as are exhibited in this case, as well as others that can be easily imagined.

Under the law, as originally passed in 1838, the duty of determining upon, ordering, and giving notice of the election for the removal of a county seat, was confided to the chief justice of the County Court. (Hart. Dig., art. 338, sec. 2.) Under this law, the implied power to receive and count the votes, and declare the result of the election, by the chief justice, was assumed and acted on, and such assumption and action was held to be proper. (*Alley v. Denson*, 8 Tex., 297.) Now, when this power has been given, and this duty has been imposed on the County Court, (by the law of 1873,) the same implication in their favor arises, to do everything else that may be necessary in the execution of the law, and to determine and declare the final result of the election. Why make the change, if it was not to intrust the performance of this most important matter to the judgment and discretion of the whole court, elected by the voters of the county, rather than to one member of it? The very fact of making the change in the law is a convincing argument that an improvement in the law, in giving greater security to the rights of the people of the county, was intended by the Legislature; for certainly

there is no more important business intrusted to the County Court than this, of carrying into effect the law, in the removal of a county seat. (Paschal's Dig., arts. 6110-6112.)

According to the allegations of the petition, the three members of the County Court acted in this case without authority, not having been called in special session as a court, which the District Court, in acting on exceptions to the petition alone, must have regarded as true, if the court had had jurisdiction to adjudicate the case at all. Of course, the members of that court must be organized as a court under the law, to make any action valid on their part.

It is contended by counsel for appellants, that, although this has been repeatedly held to be a question pertaining to the political department of the Government, it has become a subject of judicial cognizance, by the provision in the Constitution of 1869, which gives to the District Courts power to issue writs necessary to give them a "general superintendence and control over inferior tribunals." (Const. of 1869, Art. V, sec. 7, Paschal's Dig., p. 1115.) This clause is not contained in the Constitution of 1875, and therefore the District Court could not now issue any writ by virtue of said clause. (Wall *v.* The State, 18 Tex., 682.) If, however, the District Court could now issue such a writ, for the purpose of superintending and controlling the action of the County Court, it must be in relation to some private right of a person or persons which is recognized by law as being the subject of judicial action. It has been held by this court, in cases involving the question of the removal of the county seat by a vote of the qualified voters, that the citizens of the county had no such legal right in the locality of the county seat as would enable them to bring a suit to prevent a change of it by the authorities appointed by law to act on that subject. (Alley *v.* Denson, 8 Tex., 297; Arberry *v.* Beavers, 6 Tex., 457; Walker *v.* Tarrant County, 20 Tex., 19; McClelland *v.* Shelby County, 32 Tex., 17.)

It is unnecessary to consider or to endeavor to point out

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what action of the County Court might possibly be such as to affect the rights of individuals in such way as to entitle them to a suit in the courts for redress. But upon this particular question of the removal of the county seat, the decisions of this court have been numerous and uniform, from an early period to the present, that no such vested right exists as will authorize this proceeding in court to redress it. Following those decisions on this ground, we must affirm the judgment of the District Court dismissing the petition of plaintiffs.

AFFIRMED.

TREASURER OF THE STATE v. M. A. WYGALL ET AL.

1. **CHANGE OF VENUE—ESTATES OF DECEDENTS.**—The remedy given to claimants of an estate to bring suit for its recovery, in the county where the letters of administration were issued, (Paschal's Dig., art. 1354,) is subject to the right of either party to have the venue changed, for any cause provided by the general law governing changes of venue.
2. **STATUTE CHANGING REMEDY—VESTED RIGHT.**—The Legislature may change, modify, or otherwise regulate the remedy, provided a substantial remedy is left for the assertion of a right. There is no vested right in a particular remedy.
3. **CHANGE OF VENUE—ESTATES OF DECEDENTS—VESTED RIGHT—STATE TREASURER.**—In May, 1871, the Legislature passed an act providing for the change of venue, from Fort Bend county to Travis county of a case against the State treasurer, involving the ownership of assets turned over to the treasurer, under the laws relating to the administration of the estates of deceased persons. The administration was closed in Wharton county, where the suit was begun, which was afterwards removed, by change of venue, under pre-existing law, to Fort Bend county, in April, 1871: *Held*—
 1. That the suit, being against the State treasurer in his official, and not in his individual capacity, was in effect a suit against the State, which had been permitted under a statute applicable to it; and that the Legislature had power to protect the interests of the State, by requiring the particular suit, and all others of like character, to be removed to the District Court, at the State capital, in Travis county, where the interests of the State could be more conveniently protected.

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2. Though the exercise of a legislative power, thus to provide for a change of venue after suit brought, might be used oppressively, the lack of such a power might result in the perpetration of the most flagrant injustice.

3. Where the State has, under her laws, assumed a trust in the custody of an estate not claimed by heirs, and the general rules prescribed for the administration of the trust in any particular case are inadequate, the State, by its Legislature, has power, commensurate with its assumed duties and responsibilities, to make the remedy complete, by special law, if necessary, for the protection of the just rights of others, or the security of its own in the trust property.

4. Property of an estate thus turned over to the State treasurer by an administrator, occupies the same position as property that has been escheated to the State; and in either case, it may be sued for under the permission of the laws.

5. In such a suit, the State is substantially a party, and can be sued only on its own terms, whether prescribed generally or specially; the Legislature is not limited in prescribing the terms, unless some constitutional limitation of its power exists, prohibiting it from passing the particular law for the protection of the State.

6. The act of 1870, relating to the estates of deceased persons, being prospective in its operation, though it did not authorize a suit against the State treasurer to recover assets turned over to him, when the heirs were unknown, as was done by the act of 1848, yet it did not have the effect to abate a suit properly brought for such a purpose before the act of 1870 was passed. The right to bring such a suit, once having been conferred, could not, after the institution of the suit under the act of 1848, be taken away, without the violation of a vested right in the heirs or distributees.

The following propositions are maintained as the individual opinion of the Chief Justice :

1. **STATE TREASURER—ESTATES OF DECEDENTS—JUDGMENT.**—A judgment cannot be rendered against the State treasurer, in his official capacity, on the suit of one claiming as an heir for uncollected assets placed in his hands under the statute. The statute only authorizes such a suit for the money when collected.

2. **SAME.**—The comptroller, in drawing a warrant, and the treasurer, in paying, must do it under and in accordance with the terms of a law authorizing it; and there is no law authorizing the treasurer to pay out or deliver uncollected assets of an estate; but, on the contrary, there is a law directing him to collect them, and when collected as money, he can pay the same out, on a judgment rendered against him, under the statute authorizing suit against him for the money.

Statement of the case.

3. STATE TREASURER—JUDGMENT—ESTATES OF DECEDENTS.—The State treasurer, as such, cannot be bound by the judgment of a court, for that which he can find no authority to do by the law relating to and regulating his duties as an officer of the Government. He does not hold property of an estate deposited with him under the law in trust, to be delivered to any person who may establish by a judgment his beneficial interest in it, but in trust to be held until he can part with it according to the terms of some law, which authorizes or directs him. This is in accordance with his duties as State treasurer, in which capacity he is possessed of the assets, and not as an individual depository of trust property, who can be compelled, by the judgment of a court of equity, to deliver it to one who has recovered a judgment for it.

4. A suit cannot be maintained against the State treasurer, as such, for uncollected assets of an estate, which he has no authority under the law, to deliver.

5. The key that unlocks the State treasury, is an act of the Legislature, directing a thing to be done, which may be demanded; and not the judgment of a court, founded on equitable considerations, reaching beyond and changing the terms of the law in the disposition of property.

APPEAL from Fort Bend. Tried below before the Hon. Livingston Lindsay.

In addition to the facts contained in the opinion, the papers in the cause contain the following correspondence between the attorney for the appellees, and comptroller of the State, with indorsements:

“AUSTIN, TEXAS, 16th May, 1871.

“COMPTROLLER OF THE STATE OF TEXAS:

“Your applicants, Joseph B. Wygall, Thomas B. Wygall, James S. Wygall, John W. Vermillion, Corela S. Hooper, Henry Hooper, William G. Hagerman, and Sarah Hagerman, the heirs and only heirs of John C. Clark, deceased, respectfully represent that they herewith file a decree against the treasurer of the State of Texas, which directs the comptroller of the State of Texas to draw his warrant upon the treasurer, for the assets and title papers of the estate of said Clark, deceased.

“They exhibit proper powers of attorney, and respectfully

Statement of the case.

request that said papers, assets, &c., be delivered to them in accordance with the terms of said decree.

“W. L. ROBARDS, *Att’y for said Heirs.*”

Upon which the following indorsement was made:

“COMPTROLLER’S OFFICE,
“AUSTIN, TEXAS, *August 16, 1871.*

“Respectfully referred to the Hon. William Alexander, with request that he examine the papers and facts, and then advise the comptroller if it is his duty to turn the estate of Clark over to claimants. Very respectfully,

“A. BLEDSOE, *Comptroller.*”

And upon which the attorney general made the following indorsement:

“ATTORNEY GENERAL’S OFFICE,
“*August 16, 1871.*

“Respectfully returned, with the opinion that the estate cannot be turned over to the claimants on the within judgment, because instructions have been issued, by direction of the Governor, from this office, to have this case brought up for revision to the Supreme Court. Besides, suits are now pending, both in the United States Circuit Court, at Galveston, and in the District Court for Wharton county—suits brought by other parties, who claim to be the heirs of the estate. The estate cannot be turned over *pendente lite*; and if it were, any other set of heirs that might recover, might hold the comptroller and the treasurer responsible on their official bonds. For these, with other reasons, it is deemed improper to turn over the estate.

“ALEXANDER, *Attorney General.*”

And thereupon the comptroller made the following indorsement:

“The comptroller declines having any connection with the turning over the estate, until the courts of the country determine definitely and finally who the heirs are.

“A. BLEDSOE, *Comptroller.*”

Argument for the appellant.

George Clark, Attorney General, for appellant.—This action is not an ordinary one between citizen and citizen, but is, in its nature, a suit against the sovereign, instituted by its consent and authorized by its grace. As a question of power and law strictly, the State could have provided, that upon payment into the treasury of the unclaimed assets of a decedent, title thereto should vest in the State, to the exclusion of all future claimants; or, what would have been tantamount thereto, it could have failed to prescribe a remedy or mode of procedure for the recovery of such assets, or to have invested any of its courts with the necessary jurisdiction; for, I apprehend, without the statute in question, no suit would be maintainable against the treasurer. (*Houston Tap and Brazoria R. R. v. Randolph*, 24 Tex., 317.)

The State, through its legislative department, having, of its grace, furnished a remedy, that remedy is, at all times, subject to legislative control, liable to be changed, modified, or abolished even, at the pleasure of the law-making department of the Government. Even in ordinary actions between citizens, this is substantially correct, with the qualification, that some remedy must be always provided. (*De Cordova v. Galveston*, 4 Tex., 470; *Paschal v. Perez*, 7 Tex., 348; *Bronson v. Kinzie*, 1 How., U. S., 318.)

A jurisdiction given by statute can be wholly abrogated and taken away by similar method; and the rule has been extended, so as to include a jurisdiction conferred by the organic law, with such exceptions and under such regulations as the Legislature may prescribe. (*Ex parte McCardle*, 7 Wall., 506.) And the repeal of an act conferring or regulating the jurisdiction, operates as an abatement to suits pending. (*Id.*)

The application of these rules to the point in issue, seems pertinent. If the jurisdiction given by statute can be taken away in the same manner, this power ought certainly to include the lesser. The act in question does not attempt an adjudication of rights, nor, strictly speaking, does it affect

Argument for the appellant.

the remedy. It simply changes the forum for the determination of rights from the county of Fort Bend to the county of Travis, after a change had been effected, on motion of defendants in error, from Wharton county, the case again transferred back to that county, and a third time changed and transferred back to Fort Bend county. No contract is impaired, no right or remedy abridged; but after the cause was docketed in Fort Bend county, and before any adjudication was had, the Legislature, which had said such suit was maintainable only in Wharton county, put in exercise its undoubted power, and designated Travis county as the proper forum for final determination.

No violation of positive constitutional provision is detected in the act; and, if it be nugatory, it must be solely on the ground, that the act of changing venue is judicial in its nature, and therefore not exercisable by the legislative department. I do not so interpret the act. The true intent and meaning of it was, to authorize a change of venue, upon application of the attorney general, leaving the orders necessary, to be made by the court. The State had consented to be sued in one county, the suit had been transferred to an unauthorized county, and it now renewed its consent, taking care to designate the county of Travis, in which was the seat of Government, in which this privilege must be exercised in future. No matter what our views may be as to the propriety of such legislation, I think its competency and validity, under established principles of law, must be determined affirmatively.

This view is strengthened by reference to the recent amendments to our Constitution. (See Gen. Laws, 1874, pp. 234, 235.) The inhibition of these amendments, as to "providing for change of venue in civil and criminal cases" by special laws, being prospective in their operation, would seem to give rise to an inference not unnatural or strained, that before their adoption, such special legislation was not unauthorized. The original instrument defining the powers of

Argument for the appellees.

Government was the work of the people who adopted it, and so are the amendments; and these later expressions ought not to be wholly insignificant.

Legislation of a similar nature has been sustained by the courts of other States, as not trenching upon the province of the judiciary, and an appeal has been allowed by statute after the right thereto had been barred. (*Prout v. Berry*, 2 Gill., 147; *The State v. N. C. R. R.*, 18 Ind., 193.)

II. The court below erred in entertaining suit for the assets of the estate, and in rendering judgment for the delivery to defendants in error of such uncollected assets: (citing *Paschal's Dig.*, arts. 1354-3676; 24 Tex., 317; Constitution, art. XII, sec. 6, and art. 4, secs. 20, 21; *Hall v. Claiborne*, 27 Tex., 222, 223.

John T. Harcourt, for appellees.—The special act, approved May 19, 1871, cannot oust the jurisdiction, or change the venue of said cause, because of the misdescription and want of identity with the pending suit. (*Crane v. Reider*, 28 Mich., 527.)

In *Ex parte Heath et al.*, 3 Hill, 42, it was said by the Supreme Court of New York, that the language of an act, designed to divest that court of its jurisdiction over the proceedings of inferior tribunals, "must express the intent with such clearness as to leave no room for doubt." (*Parsons v. Bedford*, 3 Pet., 433.)

I insist that the special act, changing the venue in said cause, was unconstitutional and void, because it was an exercise of judicial power. I refer the court, with much confidence, to the case of *Lewis et al. v. Webb*, 3 Me., 298.

By the laws in force in Texas at the time of the passage of the special act, the judicial power was vested in the presiding judge of Fort Bend county, to determine whether any and what reasons, or causes, existed for changing the venue in said cause. (*Paschal's Dig.*, art. 1416.) "A motion for a change of venue is addressed mainly to the discretion

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of the judge of the District Court." (*San Antonio v. Jones*, 28 Tex., 19.)

It was a private right of the appellees to have this case tried in Fort Bend county, unless by the general law of the State it could be made to appear to the district judge that legal causes existed for changing the venue to an adjoining county. Upon a motion made for that purpose, notice must be given to the appellees. They could appear, and, by counter affidavits, show that the pretended causes were not legal, but purely imaginary or political. Then the district judge would adjudicate upon the facts, and his judicial decision would determine the question of venue. If he erred, the appellees could, by bill of exceptions, have the ruling reviewed by the Supreme Court, and thus secure all their rights, by "the due course of the law of the land." (*Smith's Comm. on Const. Constr.*, sec. 347.)

"In reference to acts of the nature we have been considering, each act must depend upon its peculiar phraseology and provisions. The court will look to the particular circumstances of the parties applying for, and to be affected by it, as well as their intention, and the intention of the Legislature, and the object to be accomplished." (*Ib.*, sec. 358.)

Statutes which violate the plain and obvious principles of common right and common reason, are null and void." (*Ham v. McLean*, 1 Bay, 98.)

The special act of the Legislature, under review, was not the "law of the land," as defined by Chief Justice Hemphill, in *Janes v. Reynolds*, 2 Tex., 251.

I invite special attention to the late valuable work of Cooley on *Constitutional Limitations*, page 351.

ROBERTS, CHIEF JUSTICE.—The defendants in error recovered a judgment establishing their right to the assets and title-papers in the hands of the State treasurer, belonging to and turned over from the estate of John C. Clark, deceased, whose estate was administered in the county of Wharton.

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There is no assignment of error that the verdict was not supported by the evidence, in finding that defendants in error were the heirs of John C. Clark, and that the effects of said estate had been turned over to the treasurer of the State, by the administrators of said estate, on the 20th day of September, 1866, under an order of said court, as directed by an act of the Legislature of the State of Texas, of the 15th of November, 1864. (Paschal's Dig., art. 3676.)

This act provides, that when property under administration will escheat for the want of heirs, the County Court shall order the administrator to sell all of the property, who, after selling it, taking notes and mortgages, shall close the administration, and turn over to the treasurer of the State the assets thereof, who shall collect the same, as other debts due by debtors to any other creditor. The petition was filed on the 5th day of February, 1867, after which the treasurer appeared and answered.

The venue was changed, by order of the presiding judge, from Wharton to Fort Bend county, where the judgment was rendered in favor of the defendants in error.

The first error assigned by the plaintiff in error is, that "the venue was improperly changed to Fort Bend county, and the District Court of the latter county had no jurisdiction."

The only entry in the record relating to the change of venue, is as follows: "April 7, 1871; motion to file depositions, *nunc pro tunc*, according to date of receipt, granted; and ordered that the clerk will so file motion to consolidate this suit with Nos. 765 and 789. Motion overruled. The presiding judge being disqualified, the venue of the case is changed to Fort Bend county;" and directed that the records and papers therein be transmitted to the clerk of the District Court of Fort Bend county.

It may well be considered, that the remedy was given to bring a suit in the county where the administration was taken out, subject to the general law, giving the right to change the venue; and the disqualification of the judge is one of the

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grounds specified in the Constitution of 1869, and no exceptions were taken at the time to the manner in which it was done.

The second error assigned is, that "the District Court of Fort Bend county erred in retaining jurisdiction after the passage of the special act of 1871, and in overruling application for change of venue thereunder."

The facts relating to this assignment are, that on the 19th day of May, 1871, the Legislature passed an act providing "that the suit of Mildred Ann Wygall *v.* The State of Texas, pending in the twenty-first judicial district in the county of Fort Bend, be and the same is hereby changed to the county of Travis, in the twenty-seventh judicial district;" and further directing the judge of the twenty-first district, upon application of the attorney general of the State, or his legal representative, to change the venue of said suit. (Gen'l Laws of 1871, p. 109.)

In pursuance of this statute, and upon request of the Governor of the State, the attorney general requested the district judge of the twenty-first district to change the venue of the case named in the act, as therein indicated, by written communication dated 23d of July, 1871, at attorney general's office. These requests and the law were read in open court by the presiding judge, who stated that he had received them by special messenger from the attorney general; and the attorneys for the State, there present, moved the court to change the venue, as it appears by bill of exceptions; whereupon defendants in error filed their objections at length against the change of venue, which were sustained, on the 11th day of July, 1871, upon the ground that the law directing a change of venue was contrary to the Constitution of the State; and then and there the court proceeded to the trial of the case in the District Court of Fort Bend county, on the same day, to wit, the 11th day of July, 1871. A bill of exceptions was taken, and filed, to the ruling of the court upon this application, which is found in the transcript.

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This exception presents the question, whether or not the Legislature has power to pass a special law for the change of venue in a particular suit of this kind.

The general rule is, that the Legislature may, by law, change, modify, or otherwise regulate the remedy, provided a substantial remedy is left for the assertion of a right, and that there is no vested right in a particular remedy. (*DeCordova v. The City of Galveston*, 4 Tex., 470; *Cooley's Const. Lim.*, 361.)

It has been held, in Maryland, under this general doctrine, that the right of appeal in a particular case, which had been lost by the lapse of time, might be revived by a special statute. (*Prout v. Berry*, 2 Gill., (Md.) 147; *State v. N. C. R. R. Co.*, 18 Md., 193.) The contrary has been decided in Maine. (*Lewis v. Webb*, 3 Me., 298.)

In this case, there are assets to the amount of over one third of a million of dollars, turned over into the treasury of the State, under the laws relating to the administration of estates of deceased persons. A suit has been instituted against the treasurer for them, in the county where the administration had been closed, and removed by a change of venue to another county. This suit is against the treasurer, as an officer of the Government, and not individually; and therefore it is, in effect, a suit against the State, which has been permitted to be brought under a general law applicable to such a case. Being a large amount, other suits may be brought by other persons, claiming to be heirs of the deceased. Has the Legislature no power to protect the interest of the State, by requiring this suit, as well as all others that may be brought, to be removed to the District Court at the State capital, where it may be attended to by its officers there, and where, from the number and character of the population of Travis county, there may be greater security of a proper verdict? This is a question of legislative power; and, though it might be used oppressively on the other hand,

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the lack of such a power might result in the perpetration of the most flagrant injustice.

The effects of this estate, turned over to the treasurer by the administrators, occupy the same position as property that has escheated to the State by regular proceedings, instituted by the district attorney under the law regulating escheats. Whether in the treasury of the State by one proceeding or the other, heirs may sue for it, under the permission of the laws. (Paschal's Dig., arts. 3671, 3676.)

By the default of the parties claiming to be the heirs of the intestate, in not coming forward during the administration of the estate, and seeking a distribution of the effects, and contesting, if necessary, their right with any other adverse claimants, "in the due course of the law of the land," the State has had to assume an important trust, in taking charge of and in becoming responsible for it to those who may be able to show themselves entitled to it, in the special remedy given to them substantially against the State for the recovery of the property from the State's constitutional depository, where it has been placed; and when it is found that the general rules prescribed for the administration of this trust, in any particular case, are inadequate, the State, by its Legislature, should have a power, commensurate with its assumed duties and responsibilities, to make the remedy complete by a special law, if necessary, for the protection of the just rights of others or the security of its own. This is not a suit between equals—individual members of society—as between whom the Government must stand impartial in awarding to them their rights according to the general laws of the land. On the contrary, the State is a party substantially, and can be sued only on its own terms, whether prescribed generally or specially.

Pursuant to the prayer of the petition, the judgment in this case requires the comptroller to draw his warrant upon the treasurer for the assets in his custody, which is, in form, the usual mode of reaching the funds of the State. It may be

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said that they are only held in trust, and will only escheat finally to the State in the absence of the proper heirs appearing to claim them. So the State holds all of its other property in trust, either for public use, or for those who, under the laws, may be entitled to claim it in the mode prescribed. This results from the principle that a sovereign State can be sued only on its own terms. The Legislature is not limited in the mode of prescribing the terms, whether by general or special laws, unless some constitutional limitation of its power can be found prohibiting it from passing such laws for the protection of the State.

The constitutional limitations that were invoked in the numerous exceptions taken to this special law of the Legislature, directing a change of venue in this case from Fort Bend to Travis county, are not applicable in this case, where the State is regulating the remedy in a suit against itself, even if it should be held that they or any of them were applicable in restraining the Legislature from passing such a law in regulating the remedy, as between individual litigants in ordinary suits in courts. With the policy or motive of passing such a special law in this case, we have nothing to do. As it presents itself to the court it is a question of power in the Legislature. The amendments to the Constitution, January 18, 1874, prohibiting the Legislature from passing such a special law, may be regarded as some evidence, though not conclusive, that the Legislature did not regard its power to do it restrained by any other provision of the Constitution. (Acts of 1874, p. 235.)

The objection, that the names of the parties to the suit were misdescribed in the act, was not made at the trial below. On the contrary, the parties and the court understood it to apply to this particular suit, and no notice was taken of the fact that it was styled in the act, a suit against the treasurer. It may fairly be concluded by this court, from the description of it in the act, that this was the suit the venue of which was intended to be changed from Fort Bend to Travis county.

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The fourth assignment of errors is as follows, to wit:

“The law under which this suit was instituted was expressly repealed before rendition of judgment; and such repeal operated *ipso facto* as an abatement.”

The judgment was rendered in Fort Bend county District Court, on the 11th day of July, 1871. The suit was brought on the 5th day of February, 1867, under the law of 20th March, 1848, section 93, (Paschal's Dig., art. 1354,) as amended by the act of 15th November, 1864, and not under the law of escheat of 20th March, 1848, (Paschal's Dig., art. 3671.)

The law regulating the estates of deceased persons, passed in 1848, was repealed by the law passed on that subject by the act of 1870, with certain reservations, (Paschal's Dig., art. 5770,) which substituted act does not contain the same provisions, in terms, as provided in the acts of 1848 and 1864, as above quoted, in relation to the disposition and recovery of funds that have been turned over to the treasurer for want of heirs or legatees appearing.

This statute, however, does make provisions in such cases for the property to be sold, and the money collected and turned over to the treasurer of the State, from time to time, by the administrator, until he has turned it all over, as provided in the act of 1848, (Paschal's Dig., arts. 5755 to 5763;) and it provides further, that “where a person, entitled as distributee, shall appear after the funds have been paid into the State treasury, the same proceedings shall be had to determine the right to the money in the treasury as if he had appeared before the property was sold for that purpose; and the order of the court establishing the right of a distributee thus appearing, and the share to which he is entitled, shall be sufficient authority for the State treasurer to pay over the amount.”

The mode of determining who is entitled to the estate and the share of each is provided for in this law, by citing the parties interested, and an adjudication of the District Court in

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which the estate is administered. (Paschal's Dig., arts. 5746 and 5605.)

It will be perceived that this law of 1870, which was the law relating to estates in force when the judgment was rendered, on the 11th day of July, 1871, did not provide for a suit against the treasurer, in order to reach assets in the hands of the treasurer that had been turned over for want of heirs, distributees, legatees, nor even for the money so turned over to the treasurer, but instead thereof, it contemplated a proceeding in the District Court where the estate is, or was administered, the same as that upon an ordinary distribution of an estate, upon the application of a party interested; and the judgment of the court, in that proceeding, should be authority upon which the treasurer of the State should pay the amount adjudged to the applicant. There were difficulties, in applying this law to this case, on account of what had already been done, conformably to previous laws. The estate had been closed, and the assets, such as notes and mortgages, had already been turned over to the treasurer, under the directions of the act of 1864, and were not by him held in the shape of money, as in this act it was contemplated it should be, turned over to him, unless he had collected it, which is not stated in the pleadings. Supposing, then, for the present, that this suit was properly brought against the treasurer, and for the recovery of the notes and mortgages, being assets, would the change of the law, as herein described, by the act of 1870, in which no suit was authorized to be brought against the treasurer, as was provided in the act of 1848, have the effect to abate this suit, which was so properly brought before the act of 1870 was passed? The act of 1870 was, from its terms, prospective in its operation, and made no reference whatever to suits that had already been brought against the treasurer by the distributees of an estate, as authorized by the act of 1848. It is evident there was no express intention on the part of the Legislature to discontinue such a suit. The authorities that have been referred to as sustaining the

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doctrine, that this suit would thereby abate, have reference mostly to penalties, or penal statutes, or to rights conferred by the Government not completely vested or perfected. (Dwarris on Statutes, 538; *Wall v. The State*, 18 Tex., 682; *Norris v. Crocker*, 13 How. U. S. Rep., 429; *Ins. Co. v. Ritchie*, 5 Wall., 541; *Ex parte McCardle*, 7 Wall., 506.)

In this matter, our laws do recognize in the heirs or distributees a substantial vested right of property in the effects held in trust for them by the State, provided only they can and do establish it in the manner prescribed by law; and therefore a remedy once given, and adopted by a suit in court, could not entirely be taken away without the violation of a vested right in the heirs or distributees.

It is true that, by their default in not appearing during the pendency of the administration, the State has taken charge of the property, and it may become the property of the State, as escheated property, upon their continuing to fail in applying for and establishing their right to it; still, it is not in the nature of a bonus or privilege granted, the right to which is only perfected by suit; but if they sue and recover at all, it is on the principle that they have a vested right of property before they sue for it, which they may recover by the suit prescribed by law. The remedy, therefore, which has been given to recover it, though subject to modification pending a suit, should not be abrogated entirely. (*De Cordova v. City of Galveston*, 4 Tex., 470; *Paschal v. Perez*, 7 Tex., 348; *Bronson v. Kinzie*, 1 How., (U. S. Rep.,) 318.)

The law of 1870 expressly prescribes that "no remedy to which a creditor is entitled, under the provisions of the laws heretofore in force, shall be impaired by this act." (*Paschal's Dig.*, art. 5771.) This shows that the Legislature did not intend to cut off from a remedy those having rights under previous laws, who were pursuing the remedy previously authorized, though it cannot be said that it literally applies to the plaintiffs in this suit. Furthermore, the Legislature recognizes this suit after the passage of the law of 1870, by a spe-

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cial law, requiring a change of venue in it, which would have been useless, if it had been thought that no suit of the kind could be maintained. These enactments, though they may not be a warrant for maintaining the suit, are presumptive evidence in favor of its not having been intended to take away the remedy that had been pursued in the bringing of this suit.

The third assignment of error is as follows, to wit: "The court below erred in entertaining suit for the assets, and in rendering judgment for the delivery to the defendants in error of the uncollected assets." Under this, reference is made to the act of 20th March, 1848, which provides, that "whenever any funds of an estate shall have been paid to the treasurer of the State, under the provisions of this act, any heir, devisee, or legatee of such estate, or their assignees, or either of them, may recover the portion of such funds to which he or she would have been entitled, if the same had not so been paid to the treasurer." It provided, in the same section, for a recovery of such funds, and any title papers that may have been deposited with the comptroller, by a suit in the District Court of the county in which the estate was administered. (Paschal's Dig., art. 1354, sec. 93.) This act provided that the estate should remain in the hands of the administrator, in such cases, until all of the property was sold, and the debts for the sale thereof should be collected, and that the funds, in money, should, from time to time, be paid to the treasurer of the State, and to be so continued until all the available means of the estate had thus been converted into money, and turned over to the treasurer. (Art. 1351, sec. 90.) The act of the 15th November, 1864, changed this mode of proceeding in such cases, by requiring all of the property of the estate to be sold by the administrator, and the notes and mortgages taken therefor to be immediately turned over to the treasurer of the State, under the designation of "assets of the estate," who was authorized to collect the same in gold or silver, as any other creditor

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under the laws of this State. (Paschal's Dig., art. 3676.) The act of 13th November, 1866, authorized suits to be brought in the name of the State. (Genl. Laws, p. 236, sec. 3.) The act relating to escheats, passed 20th March, 1848, also provides for a suit for money deposited with the treasurer as escheated, by an heir or legatee, in the county where the property was sold; and upon the right being established, the judgment shall direct the comptroller to issue his warrant for the same. (Paschal's Dig., arts. 3671, 3672.) Notice to district attorney, not to treasurer, was required under this law.

The petition alleges that the property of said estate was sold, notes and mortgages therefor taken, and by order of the County Court, in February, 1863, and afterwards, in pursuance of the act above quoted, of the 15th November, 1864, the administrators, by order of court, turned over the assets, notes, and mortgages to the treasurer of the State; and with the petition is filed an exhibit of a receipt of the treasurer, of the 20th of September, 1866, for said assets, amounting to \$384,428.12, as shown by the list receipted for, which is certified to as having been filed in records of the County Court of Wharton county in said estate, being the assets sued for in this action.

Both the laws regulating the estates of deceased persons and the law regulating escheats, provide for a suit for the "funds," and not for the "assets;" that is, for the notes and mortgages turned over to the treasurer. By an examination of the different provisions of those statutes, it will be found, without any sort of doubt, that the "funds" to be sued for is money in the hands of the treasurer, wherever that word is used. The statute of 1864, which provided for the turning over of the "assets"—that is, the notes and mortgages—after the property of all sorts had been sold, provided also for the collection of those debts, by the treasurer, by suits or otherwise, as in collecting debts by any other person; and the act of 1866 provided for the bringing those suits in the name of the State. These laws were passed, and in force, while the

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act of 1848 was still in force, expressly authorizing heirs or distributees to bring a suit against the treasurer for the "funds" (meaning the money) in his hands. Effect may have been given to them by suing the treasurer to establish the right, and for the money collected and to be collected by him. The comptroller, in drawing a warrant, and the treasurer, in paying, must do it under and in accordance with the terms of a law authorizing it; and there is no law authorizing the treasurer to pay out or deliver the notes and mortgages, but, on the contrary, there is a law directing him to collect them, and after that is done by him, then he can readily find a law authorizing him to pay out the money thus collected, to the person entitled to it, by virtue of a judgment rendered against him for it, under the law authorizing the suit for the money. The treasurer, as such, cannot be bound by a judgment of the court for that which he can find no authority to do, by the laws relating to and regulating his duties as an officer of the Government. He does not hold this property in trust, to be delivered to any person who may establish, by a judgment, his beneficial interest in it, but in trust, to be held until he can part with it according to the terms of some law which authorizes or directs him to part with it. This is in accordance with his duties as the custodian of the State treasury, in which capacity he is possessed of the assets, and not as an individual depository of trust property, who may be compelled by the judgment of a court of equity to deliver it to one who has recovered a judgment for it. Therefore, a suit should not have been brought, and judgment recovered, for that which he had no authority of law, as an officer, to deliver, but for that which he had such authority, which was the money in his hands, collected, and to be collected.

The key that unlocks the State treasury is an act of the Legislature, directing the thing to be done which is demanded, and not the judgment of a court, founded on equitable considerations, reaching beyond and changing the terms of the law, in the disposition of property.

Syllabus.

There is no question raised upon the issue of the heirship of the plaintiffs, which was established by the verdict of the jury.

The statement of facts does not embrace the list of assets; but as it is made an exhibit in the petition, and there was no question about its correctness, or about the assets having gone into the hands of the treasurer, as alleged, no notice need be taken of it in this court.

Upon the error of the court in overruling the motion to change the venue from Fort Bend to Travis county, in pursuance of the special law, a majority of this court agree upon a reversal of the judgment.

Upon the other points in the case, this is only the opinion of the Chief Justice, except that there is no disagreement as to the change of venue from Wharton to Fort Bend county.

REVERSED AND REMANDED.

D. VOGELSANG ET AL. v. W. W. DOUGHERTY ET AL.

1. **ESTATES OF DECEASED SOLDIERS.**—If the decedent was of the class of persons whose estates were protected in the act of May 18, 1838, (Hart. Dig., art. 984,) and in the act of January 14, 1841, (Paschal's Dig., art. 1400,) as "volunteers from a foreign country, who may have fallen in the battles of the Republic," &c., it should be held that a grant of administration upon his estate, and all proceedings had therein, touching the administration, were absolutely void.
2. **JURISDICTION OF PROBATE COURTS—EXCEPTIONS.**—The acts forbidding the grant of administration upon the estates of deceased soldiers, create exceptions to the general power and jurisdiction of the Probate Courts. To have the benefit of the exception, the facts relied on, as avoiding the jurisdiction, should be clearly established, the presumption being in favor of the jurisdiction.
3. **SAME—COLLATERAL ATTACK—STALE DEMAND.**—When the general jurisdiction, assumed by the Probate Court, to grant letters of administration, is attempted to be collaterally impeached, thirty-one years after its assumption, and more than twenty years after one of plaintiffs came to Texas to look after the estate, by proving facts,

Argument for the appellees.

avoiding the jurisdiction, (as that the deceased was a soldier, &c.,) and when the lands have, subsequent to sale under such administration, been bought and sold by innocent parties, and in which time, part has a second time passed through the Probate Court, it seems, that, even had the proof of the facts alleged been clear, the claim of the heirs, attacking such administration, should be held a stale demand.

4. CITIZENS OF TEXAS NOT INCLUDED IN SAID ACT.—The exception provided in said acts against the grant of administration in estates of deceased soldiers, did not include citizens of Texas; and it was error to instruct the jury that said acts were applicable alike to all volunteer soldiers, whether citizens, or from a foreign country.
5. FACT CASE.—See facts held insufficient evidence that a party was a “volunteer from a foreign country, who had fallen,” &c.
6. STATUTES CONSTRUED.—Act of May 18, 1838, Hart. Dig., 984; act of December 24, 1838, Hart. Dig., 989; act of January 14, 1841, Hart. Dig., 1503, Paschal's Dig., 1400.

APPEAL from Colorado. Tried below before the Hon. Livingston Lindsay.

The facts are sufficiently given in the opinion.

Delaney & Cook, for appellants.

F. Barnard, also for appellants.

John T. Harcourt, for appellees.—I respectfully submit that there can be no grounds for misconception as to the legislative intention, in all the acts of the Congress of the Republic in securing to the heirs and next of kin of her deceased soldiers, the personal enjoyment of the gratuity of the Government.

The first act of 18th May, 1838, to provide for the settlement of deceased soldiers' estates, (Hart. Dig., art. 984,) was in full force until the passage of the act of 17th December, 1851. (Paschal's Dig., art. 1400.)

The third section of the act of 1838 (Hart. Dig., art. 986) prohibited the sale of any of the effects of any deceased soldier, unless the order of sale was approved by the Secretary of War.

Argument for the appellees.

It cannot be pretended, in the present case, that Dougherty was a citizen soldier, in the full exercise of his rights as a citizen, at the time he was shot by the Mexicans, while a prisoner of war, so as to bring him within the exception of the act of December 24, 1838. (Hart. Dig., art. 989.)

By the act of 14th January, 1841, (Paschal's Dig., art. 1398,) it was manifestly the intention to prohibit administration on the estate of any volunteer from a foreign country who lost his life in the military service of the Republic, unless it was by the authority of the heirs or next of kin; and to prohibit the sale of the lands of a deceased soldier without the consent of the heirs.

This was the leading idea. It was an act of justice, as well as an act of patriotic prudence, to keep men in the field, with the pledge of the Government that, if they lost their lives in her service, their heirs or next of kin should not be robbed of their lands, under the forms of probate sales.

It was legislative notice to land speculators that they could not remain at home and watch the Probate Courts, and purchase for a trifle, valuable lands that were bought with the best blood of the Texas veterans.

The opposing counsel rest their defense upon the technical grammatical construction of the language used in this act. They contend that, by the use of the words in the past tense—"may have fallen or died"—the law was only intended to apply to a class of volunteers who were killed or died before the passage of the act of 14th January, 1841. This construction would impute to the law-makers an unjust discrimination in behalf of certain volunteer soldiers.

The struggle for independence was still impending, and volunteer soldiers were needed to drive back the Indians, as well as to repel the invasion of Mexicans; and the same reason existed for "protecting the rights of the heirs and next of kin" of all soldiers. The act of 17th December, 1851, (Paschal's Dig., art. 1400,) leaves no ground for doubt as to the policy and intention of the act.

Argument for the appellees.

The preamble recites, that unauthorized persons have administered upon many estates of deceased soldiers, and sold the lands intended to be granted to the heirs of such soldiers, contrary to the intent of said acts.

It proceeds, then, by the first section, to repeal the acts of May 18, 1838, and December 24, 1838, and reaffirms the act of January 14, 1841, as having been all the time in full force and effect.

The sale of the 1,280 tract of land was made by Perry, as administrator of Dougherty, on the 1st day of January, 1850, contrary to the provisions of the act of 1838, and also contrary to the act of 1841. * * *

The sale was after the passage of the act of 17th December, 1851. By the third section of that act, the sale of the land, or land claims of any deceased soldier, was prohibited, without the consent of the heirs of such deceased soldier.

In the case of *Harris v. Graves*, 26 Tex., 580, the court say: "The administrator, by the plain terms of the statute, had no power to sell the lands of the deceased without the consent of the heirs, and the court had no power to grant a valid decree of sale," &c. (*Withers v. Patterson*, 27 Tex., 493.)

It was a question for the jury to determine the fact—whether B. M. Dougherty was a volunteer soldier and died in the service of the Republic of Texas. The proof was abundant to authorize their verdict.

[Counsel discussed the testimony.]

But the pay for improvements, as allowed by the jury, makes it a costly victory, and we have assigned cross-errors, to be considered by the court, if it can be corrected without remanding the cause.

The finding of the jury is, in effect, that the sale of the land was in fraud of the law, and absolutely null and void.

In the case of *Hatchett v. Conner*, 30 Tex., 113, Judge Coke observes: "It is difficult to perceive how a party can honestly believe that his title is good, or how his possession can

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be in good faith, when he is unable to trace his title back to the Government—the only source of title to land. While a defective or irregular apparent title may be the basis of a recovery for improvements made in good faith, a void title (if such an expression may be used) cannot be. (*Rogers v. Bracken*, 15 Tex., 568; *Pitts v. Booth*, 15 Tex., 454; *Robson v. Osborn*, 13 Tex., 298.)

In the present case, the parties could not honestly believe their title to be good. They are chargeable with notice of the acts to “protect the rights of heirs and next of kin of deceased soldiers.” They were chargeable with notice that the tract of 1280 acres of land was granted to Dougherty, as a single man, for bounty land, under the act of December 4, 1837, (Hart. Dig., art. 1834,) and that he must have served twelve months or upwards in the army to be entitled to it. The administrator’s report of the sale of the 1280 acres states that the land was granted for services in the army of Texas.

MOORE, ASSOCIATE JUSTICE.—This suit was brought, on the 11th day of September, 1873, by the appellee, W. W. Dougherty, in his own behalf, and as the agent for the other heirs of Burton M. Dougherty, to recover certain lands, situated in Colorado county, alleged to have been acquired by said Burton M. Dougherty, by virtue of military services rendered the Republic of Texas, now in possession of and claimed by appellants, the defendants in the District Court, through and under, as plaintiffs aver, an illegal and unauthorized administration upon his estate by the Probate Court of said Colorado county.

Although some comment is made by appellees’ counsel upon the fact that no decree, confirming the sale of one of the tracts of land sued for, is found upon the minutes of the Probate Court, as it is evident, from the record, that the action was brought and tried in the court below, upon the hypothesis of the illegality of the administration, and not because of any defect or irregularity of the proceedings had

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in said court, in the course of said administration, however great, it is only necessary for us at present to inquire, whether the Probate Court of Colorado county had authority to grant original administration upon the estate of Dougherty, as it did, in 1843, and letters *de bonis non*, in 1849, and whether it could confer upon the administrator last appointed, power and authority to sell the lands belonging to said estate.

The objection made to the validity of the administration, and the title of the parties claiming the land sued for under it, is, that the assumption of authority by the court to grant the administration, and order the sale of the lands belonging to the decedent, is in plain violation of the act of May 18, 1838, entitled "An act to provide for the settlement of deceased soldiers' estates," (Hart. Dig., arts. 984-8,) and that of January 14, 1841, entitled "An act to protect the heirs and next of kin to the members of the Georgia battalion, and other volunteers from foreign countries, who have fallen in the battles of the Republic, or otherwise died in the limits of the same."

It does not appear, from the record, and it was not attempted to be otherwise shown, that either of the parties to whom, at different times, letters of administration upon Dougherty's estate were committed, were the next of kin of the decedent, or that either of them produced, or had authority, from his heirs or next of kin, to take said administration on his estate. Nor can it be pretended that the court, in ordering the sale of said lands, attempted to conform its action to the provisions of said first-named act. If, therefore, decedent was of the class of persons to whose estates these acts have reference, it might, and probably should, be held, the grant of administration upon his estate by said court, and all the proceedings had therein, touching the same, were, as is insisted by appellees, absolutely null and void. But is it shown, by the record of the Probate Court, or otherwise, that Burton M. Dougherty was one of the persons to whose estates reference is had in these acts?

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It must be remembered, that, by these acts, an exception is made to the general power and jurisdiction given to the Probate Court over the estates of deceased persons. And, as the court determined, as it must be presumed, correctly, until the contrary is shown, by the grant of administration, that it had jurisdiction to render the judgment and make the orders in question, the burthen of proof is unquestionably upon him who asserts their nullity. And certainly, where the want of jurisdiction, and consequent nullity of the proceedings of the court, is sought to be shown by parol, the proof should be clear and satisfactory to establish the alleged facts from which the conclusion is to be deduced. More especially must this be so, where a considerable length of time has elapsed, after the proceedings are had, before they are called in question. In this case, the general jurisdiction, assumed by the Probate Court over this estate, is attempted to be collaterally impeached, thirty-one years after its assumption, and more than twenty-five years after one of the plaintiffs, as he testifies, came to Texas to look after his brother's estate, when, as we must presume, letters of administration, illegally granted upon it, if this action has any valid foundation, had been already issued.

At that time, it certainly could have been a matter of no great difficulty to have shown, if such was the fact, that the deceased was a "volunteer soldier, from foreign countries," or whether he was a "citizen soldier, in the full exercise of his rights as such at the time of his death." (Hart. Dig., art. 989.) In view of these facts, if the evidence to support appellees' claim was clear and satisfactory, it should have been held, we think, that appellees, having permitted the land to be bought and sold by innocent parties, who had no immediate connection with the administration, and having slept upon their rights until some of it had passed the second time through the Probate Court, their claim to it at this late day should be regarded and treated as a stale demand.

But if appellees delay in asserting their claim, justly sub-

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jected it to no unfavorable inference, it could not be held that the testimony is by any means satisfactory, to establish the essential facts which it is necessary for them to prove before they can question or impeach the grant of administration, and the order of the Probate Court for the sale of the land sued for. Indeed, the evidence in the record tends strongly, if not conclusively, to repel the truth of their alleged ground of complaint.

The act of 1841 was evidently intended for the protection of the estates of those noble and heroic volunteers from foreign countries, who, through love of liberty and sympathy for a brave and oppressed people, engaged in a seemingly unequal struggle to free themselves from oppression and establish their independence, who had fallen in battle or otherwise died while engaged in the sacred cause for which they had volunteered. It is also obvious, from the amendatory act of December 24, 1838, that the act of May 18, 1838, had no reference to administrations upon estates of soldiers who were citizens of Texas when they died. These laws were evidently intended to protect the heirs and next of kin, and to regulate administration upon estates of the soldiers to whom we have just referred. It was a sad and disgraceful fact, of general notoriety at the time these laws were enacted, and now a matter of historical knowledge, that there was in our midst a few harpies, who, under color of administrations upon the estates of the brave men who had died in aiding the cause of a people of whom, politically, they formed no part, and to maintain a Government to which they owed no duty, were filching from their heirs the pittance given them by the Government, not as compensation for their services, but in token of its gratitude, and as a memorial of their heroism and valor. Under these circumstances, had not the Government interposed by suitable legislation for the protection of the rights and interests of the heirs and next of kin of those generous volunteers who had given their lives in its behalf, it would have shown itself unmindful of the pledges offered

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as an inducement for them to come to our aid, and wanting in gratitude for the services so nobly and generously rendered by them.

Great numbers, if not most of these volunteers, had, as was well known, died from disease, fallen in battle, or been foully butchered, while unarmed prisoners. With rare exceptions, their heirs and next of kin were in a foreign country. They owed no debts to citizens of Texas, and owned no property here except the lands given them by the Government. There was therefore no necessity for an administration here upon their estates, except where desired by their heirs or next of kin. But in respect to citizens of the country, all of whom were soldiers, and none were soldiers who were not volunteers, it was altogether different, and it would have, as a general rule, been unnecessary, and most singular, to have excepted their estates from the general law of administration.

The evidence offered by appellees, to prove that Dougherty came to Texas as a volunteer is, at most, loose, vague, and indefinite. None of the witnesses knew him earlier than 1837. The fact that he had a bounty warrant, shows that he had been a soldier, but certainly does not prove that he was a volunteer soldier from a foreign country. The certificate for six hundred and forty acres, given him as a headright, seems to indicate that he did not come to Texas as a volunteer soldier. At least, it is evident from it, that he did not do so prior to August 1, 1836; for, if he had, he would have been entitled to a headright for a third of a league, instead of six hundred and forty acres of land; and certainly, if he came to Texas as a volunteer soldier from a foreign country, he had ceased to be such volunteer soldier long before his death. He was living apparently as a citizen of Houston, in 1837, when we first hear of him in Texas. He removed, as early as 1838, to Colorado county, and resided there from that time until some time in 1841, in the full exercise, as far as is shown by the testimony, of all the rights of a citizen,

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rendering military service, no doubt, as other good citizens, by "going out," as the witness says, whenever there was a call for soldiers. He went, in 1841, upon what is commonly called the "Santa Fe expedition;" but if this was a military expedition, authorized by the Government, (which has not been shown,) there were certainly others than volunteer soldiers accompanying it; and the inference from the testimony is, that Dougherty was one of these.

But if the testimony was sufficient to sustain the verdict, still the judgment would have to be reversed, for errors in the charge of the court, and for refusing to give some, at least, of the instructions asked by appellants. The views of the law applicable to the case already expressed obviates the necessity of comment on this subject. We will only add, that in the first paragraph of the charge, the court instructed the jury, in effect, that the laws to which we have referred were applicable alike to all volunteer soldiers, whether they were citizens or from a foreign country. The verdict of the jury was not an unreasonable conclusion, from this view of the law.

REVERSED AND REMANDED.

WILLIAM H. CUNDIFF v. JAMES M. TEAGUE.

1. **CONSTABLE—LEVY—EXECUTION.**—Since the act of 1846, (Paschal's Dig., arts. 987, 993,) defining the office and duties of constable, and authorizing that officer to execute process throughout the county, a constable may levy an execution on land, which, though in the county, is not in the beat or precinct of which he is constable; and in so doing, it is not necessary for him to go on the land with his execution.
2. **DISTINGUISHED** from *Leland v. Wilson*, 34 Tex., 94.
3. **PLEADING—BILL OF REVIEW.**—In trespass to try title, the plaintiff claimed as purchaser at execution sale, under a judgment obtained by himself against the defendant. The defendant pleaded the want of actual notice of the proceeding under which the judgment was

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obtained, (which was rendered after service by publication;) that the claim sued on was fraudulent and unjust, (specifying in what,) and prayed that the judgment be vacated: *Held*, That the parties being the same in both proceedings, the averments of the answer were sufficient to support it as a bill of review; and if properly supported by evidence, to authorize the reopening of the judgment, and the setting aside the sale of the land.

4. The rule in this State is, that a levy on land is not a satisfaction of the judgment, and that the possession of the debtor is not disturbed by the levy: the levy works no disseizin.

ERROR from Houston. Tried below before the Hon. L. W. Cooper.

W. A. Stewart and *Earle Adams*, for plaintiff in error.

Nunn & Williams, for defendant in error.

GOULD, ASSOCIATE JUSTICE.—This was an action of trespass to try title, for three hundred and twenty acres of land, in which the plaintiff Cundiff claimed, as purchaser at a constable's sale, by virtue of an execution on a judgment rendered by a justice of the peace, on December 26, 1868, in favor of Cundiff and against defendant Teague, for the sum of \$40.60.

The court instructed the jury, that unless the constable went on the land with the execution, and unless the land was situated in the beat of which he was constable, the levy was void, and the plaintiff acquired no title by virtue of his purchase. As the evidence was, that the levy was made by the constable on land in a different beat from that of which he was constable, and was made without going on the land, it is evident that the verdict for the defendant may have been rendered on this ground; and that if that part of the charge which has just been stated is erroneous, the judgment cannot be maintained.

However the law may have been previously, since the act of 1846, defining the office and duties of constable, and authorizing that officer to execute process throughout the county, it is believed that a constable may levy an execution on land

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which, though in the county, is not in the beat or precinct of which he is constable. (Paschal's Dig., arts. 987, 993.) The levy, which was, in the case of *Leland v. Wilson*, 34 Tex., 94, held invalid, because made on land not within the constable's beat, was made in 1841, and the decision was founded on the statute then in force.

The opinion in the case of *Leland v. Wilson* also supports the other proposition embraced in that part of the charge which we are considering, viz: that to constitute a valid levy of an execution from a justice's court, it is necessary for the officer to go on the land with his execution, it being conceded, however, that this was not necessary where the judgment was a lien upon the land. In the case of *Hancock v. Henderson*, (45 Tex., 479,) we had occasion to consider what were the requisites of a valid levy on land in cases of attachment, and incidentally in cases also of execution, and held that it was not essential that the officer should go upon the land. It was said in that case, that it had been the general practice in this State to make levies of attachment and execution without going upon the land; and it may be added, that the practice is believed to have been the same, whether the judgment was or was not a lien on the land before the levy. The rule in this State is, that a levy on lands is not a satisfaction of the judgment, and that the possession of the debtor is not disturbed by such levy. (*Howeth v. Mills*, 19 Tex., 296; *White v. Graves*, 15 Tex., 187.) In Massachusetts, where it is held that the defendant is disseized or ousted by a levy, duly returned and registered, and that by the delivery by the sheriff, the creditor is considered in actual possession and the judgment satisfied, it will be proved that the ruling is based on statutory provisions unlike any statutes in this State. (*Howe v. Bishop*, 3 Metc., 26; *Gore v. Brazier*, 3 Mass., 523; *Ladd v. Blunt*, 4 Mass., 403.) We see no good reason for requiring an execution from a justice's court, or an execution from another county, to be levied with any greater formality than in other cases of execution sales,

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where the purchaser is not placed by the officer in possession of the land sold, but must resort to an action for that purpose. (4 Kent., 432, 433, 482, 484; *Gassaway v. Hall*, 3 Hill, (S. C.,) 292.)

There is another question, which should not be passed over without notice. It is claimed that the court erred in permitting the defendant to go behind the judgment of the justice's court, and to introduce evidence impeaching the justness of the account on which said judgment was rendered. It is to be observed, however, that this judgment was rendered on service by publication, and the answer of defendant set up that fact, the want of actual notice, and, in substance, that the claim sued on was fraudulent and unjust, and prayed that the judgment be vacated. The averments of the answer were sufficient to support it as a bill of review, and, if properly supported by evidence, to authorize the reopening of that judgment and the setting aside of the sale of the land in the hands of Cundiff. (*Snow v. Hawpe*, 22 Tex., 171; *Edrington v. Allsbrooks*, 21 Tex., 188; *McFaddin v. Spencer*, 18 Tex., 441; *Kitchen v. Crawford*, 13 Tex., 519; *Musina v. Moore*, 13 Tex., 8.) The case went to the jury without any exception to the answer, either as to its substance or form, and we are not prepared to hold that there was error in the admission of the evidence objected to.

For the error in the charge of the court, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

P. J. WILLIS & BRO. v. L. L. MATTHEWS ET AL.

1. GIFT OF LAND—EQUITY.—Equity will enforce a verbal gift of land, from a father to his son, when clearly established, if it be accompanied by possession, and followed by improvements made on the strength of the gift, with the consent of the father.

Argument for the appellants.

2. **JUDGMENT—ATTACHMENT LIEN—HOMESTEAD.**—A judgment, in a proceeding by attachment, enforcing the attachment lien on land, is not conclusive of the defendant's homestead rights in the land attached, no issue regarding the homestead having been made by the pleadings. The effect of such a judgment is to enforce the attachment lien on whatever interest, subject at the time of the attachment to execution and forced sale, the defendant had in the land: the purpose of an attachment is, to hold the property on which it is levied, so that it may be subjected to execution so far as it is legally liable to execution, and no further.
3. **ATTACHMENT—PLEADING.**—If the plaintiff in attachment desires to have the question of his homestead right in property attached, settled, in the attachment suit, he should make such amendments to his pleadings as will give the defendant notice that he is called upon to defend his homestead rights, and on principle it would seem that his failure to assert such rights, would be an admission that he had none.
4. **HOMESTEAD.**—When a rural homestead is fixed upon a tract of land exceeding two hundred acres in quantity, one undivided half interest in the whole tract being the separate property of the wife, and the other half interest, being in equity the separate property of the husband, the husband's interest, subject to forced sale at the suit of creditors, is the undivided interest in the whole tract less two hundred acres, protected as the homestead from forced sale. The exemption is of two hundred acres of the land owned by both, and not of two hundred acres owned by the husband.

APPEAL from Montgomery. Tried below before the Hon. James Masterson.

The opinion states the case.

N. H. & J. R. Davis, for appellants.—We maintain that all the right, title, and interest of L. L. Matthews, in and to said land, was and is vested in appellants, by the proceedings and sale in the attachment suit. It is too late for him to insist on a homestead for himself on said land, even if the alleged gift conferred title. He should have made his claim when the former suit was pending, or, perhaps, before sale, he might have raised the question by petition in error. (28 Tex., 446.) It is too late to raise the homestead question, after a decree and sale of foreclosure on a mortgage. (29

Argument for the appellees.

Tex., 275; 24 Tex., 172; 20 Tex., 792; 13 Tex., 68; Paschal's Dig., art. 128.) And we ask only the same principle of law in the attachment, lien, decree, and sale.

We respectfully refer the court to the following authorities on the point of the conclusiveness of judgments when collaterally attacked or introduced in another suit: *Cooper v. Reynolds*, 10 Wall., 308, and cases cited in note; 11 Id., 587; 1 Tex., 309; 24 Tex., 479; 27 Tex., 495; 32 Tex., 464; *Lee v. Kingsbury*, 13 Tex., 68; *Jackson v. De Lancy*, 13 Johns., 537.

Did the District Court err in ruling that subsequent creditors could not controvert the validity of a parol gift of land by a father to a son, &c.? We maintain that it was and is error, to the prejudice of appellants; and that, notwithstanding the supposed gift, &c., to L. L. Matthews, from his father, of the undivided half of said five hundred and eighty-one and one-half acres, the same continued the property of the father till his death, and then vested in his (L. W. Matthews) heirs, subject and liable to the payment of his debts. (Paschal's Dig., art. 1373.)

John R. Peel, for appellees.—For appellees, it is respectfully contended that the parol gift of L. W. Matthews, deceased, of his half of the five hundred and eighty-one and a half acre tract of land to his son L. L. Matthews, just after his marriage, followed by immediate possession, with valuable improvements, and a continuous occupation of the same by appellees as their homestead, until dispossessed by appellants, was a completed gift, and a valid alienation of the land. (*Neale v. Neale*, 9 Wall., 1; *Richardson v. Rhodes*, 14 Rich., (S. C.) 95; *Howard v. Windham et al.*, 40 Vt., 597; *Appleby v. Anthony*, 1 Wash., 287.)

If appellee, L. L. Matthews, could have held the land against the donor, L. W. Matthews, his father, surely, at this late day, he can hold it against appellants, attacking it collaterally, and who have not shown, by presenting their claims in evidence, that they were valid, duly allowed and approved,

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and subsisting against L. W. Matthews, deceased, at the time (1860) the said parol gift, &c., was made; and certainly this burden of proof was upon them. But at the time (1860) the gift was made, it is shown in evidence that the donor, L. W. Matthews, deceased, was worth, in his own right, some \$40,000, over and above all liabilities and exemptions. *Richardson v. Rhodes*, 14 Rich., (S. C.), 95; *Millican v. Millican*, 24 Tex., 226; *Sauflly v. Jackson*, 16 Tex., 579.)

But in this case, appellants are and were creditors of L. W. Matthews, deceased, subsequent to the gift of said land to L. L. Matthews, with full notice of the gift, possession, &c., and cannot be heard to complain. (*Sexton v. Wheaton*, 8 Wheat., 229; *Hopkisk v. Randolph*, 2 Brook., 132; *Verplank v. Sterry*, 12 Johns., 536.)

GOULD, ASSOCIATE JUSTICE.—In April, 1860, at the time of the marriage of L. L. Matthews to Laura Sapp, the five hundred and eighty-one and a half acres of land in controversy in this suit was owned by H. N. Jones and L. W. Matthews, father of L. L. In June following, Jones sold and conveyed his undivided interest to L. L. Matthews, the purchase-money being subsequently paid out of the separate means of the wife. Immediately after this purchase, it is claimed that the father, L. W. Matthews, made to his son a verbal gift of the other undivided half interest in the land, placed him in possession, and told him to make his home thereon, and that the tract was forthwith improved and occupied as a homestead, and was so occupied at the time of the death of Mrs. Matthews, in the fall of 1868. Shortly after her death, L. L. Matthews rented out the place for the year 1869, and went with his children to the State of Georgia, where he remained until the winter of 1869, at which time he returned, and found his late home in the possession of appellants, Willis & Bro. Previous to his departure, Willis & Bro. had brought suit against him on a promissory note, obtained service, had sued out an attachment, which was levied on the five hun-

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dred and eighty-one and a half acres of land in controversy, subject, however, to his homestead, and afterwards there was an additional levy on the entire tract, without reserve, the levy reciting that he and his family had abandoned the premises and the State. In due time, Willis & Bro. had judgment by default for their demand, and for the enforcement of their attachment lien, and when, in February, 1869, the land was sold under an order of sale, in pursuance of this judgment, they became the purchasers, for the sum of \$100. In August, 1872, L. L. Matthews brought this suit against Willis & Bro., to recover possession, claiming his homestead of two hundred acres, and claiming, in behalf of his children, who were made parties plaintiff, that they, as heirs of their deceased mother, were the owners of the undivided half of the tract, and praying for partition accordingly.

In their answer, Willis & Bro. set up their title as purchasers at the sale before stated. They also set up title to the undivided half of the tract, as purchasers at another sale had after this suit was instituted, under another judgment, also by default, in their favor, against L. L. Matthews and some others of the heirs of L. W. Matthews, deceased, which judgment directed execution to be levied on property inherited by or partitioned to defendants from the estate of the deceased.

It seems that in 1864, L. W. Matthews was dead; that he died indebted to Willis & Bro.; that there was an attempted partition of his estate by the County Court amongst some of the heirs, and that in that partition the undivided interest in the tract of land in question was treated as a part of the estate, and was allotted to L. L. Matthews. Under the instructions of the court, however, the jury evidently found that there was a valid verbal gift by the father to the son, and that the equitable title to the undivided half of the land was in L. L. Matthews, by virtue of that gift.

That there may be a valid verbal gift of lands by the father to the son, which equity will enforce, if it be clearly estab-

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lished, be accompanied by possession, and followed by valuable improvements made upon the faith of the gift, and with the consent of the father, is now the recognized rule in this court, settled after elaborate and repeated argument and investigation. (*Murphy v. Stell*, 43 Tex., 133; *Hendricks v. Snediker*, 30 Tex., 296; and see *Curlin v. Hendricks*, 35 Tex., 225.)

Although the averments of the petition and the facts detailed in the evidence, on this point, are neither as full nor explicit as they should have been, yet we are not prepared to say that there was such a deficiency as calls for a reversal of the cause.

The court did not err in declining to rule, that the judgment enforcing the attachment lien was conclusive of appellee's homestead rights. The effect of that judgment was to enforce the attachment lien on whatever interest L. L. Matthews had in the property attached, subject at the time it was attached, to execution and forced sale. The purpose of the attachment is to hold the property so that it may be subjected to the execution, so far as legally liable to execution, and no further. It may be that, if the attachment is levied on exempt property, the defendant in attachment could, by a plea in abatement, have the levy set aside. But, unless the issue is made by the pleadings, the court does not pass upon the question of whether the property is or is not a homestead, and its judgment is neither "directly on the point, nor does it necessarily involve the decision of the question." (*Tadlock v. Eccles*, 20 Tex., 790.) The cases referred to by counsel are, either cases where suit was brought to foreclose a mortgage, and after such foreclosure the defendant was held precluded from setting up the defense which he should have made and which went to the very issue presented by the plaintiff's pleadings, or they are cases which only assert the settled rule, that a valid judgment cannot be collaterally attacked. No case has been cited supporting the proposition contended for. On principle, it would seem

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that if the plaintiff in attachment wishes to have the question of homestead settled in the attachment suit, he should make such amendments to his pleadings as would give the defendant notice that he is called upon to defend his homestead rights, and that his failure to assert such rights will be an admission that he has none.

But the claim of L. L. Matthews was, (and by the charge, the verdict, and the judgment, it was allowed,) that he was entitled to have his homestead of two hundred acres out of the tract as he might select; that his children, out of the remainder, should have set apart a number of acres, equal to half of the entire tract, and that it was only the surplus to which Willis & Bro. acquired any right. In this there was error. The evidence was, that the homestead was established on land, one undivided half of which was the wife's separate estate, and the other, in equity, the husband's. The homestead, unquestionably, may be established, and will be protected on land so owned. So long as it remains so fixed, the exemption is of two hundred acres of the land so owned, and not of two hundred acres owned by the husband. If whilst it is so fixed, a creditor acquires a lien on other land, or on the excess of the homestead tract, it is then too late for the homestead claimant to make a change which will affect that right. His homestead is protected where he himself has fixed it, and not elsewhere. In this case the homestead, as fixed and protected, was as much on the land of the wife, as on the land of the husband; and it was error to allow the husband to fix it elsewhere. The right to select a homestead does not give a right to change it to the prejudice of the vested rights of others. For the error on this point, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Syllabus.

GEORGE ROLLER v. A. P. WOOLDRIDGE, ASSIGNEE, &c.

1. **CONSIDERATION—CONTRACT—CONFEDERATE NOTES.**—A loan of Confederate States treasury notes constituted a valuable consideration upon which to sustain a contract.
2. **PRACTICE—NEW TRIAL.**—If the petition of one against whom a judgment has been rendered in an ordinary action at law, states good equitable grounds for setting aside the judgment, exceptions to it, for want of equity, should be overruled, not for the purpose of granting a new trial in the former proceeding, but that the pending proceeding in equity might be tried as an original proceeding, seeking relief against a judgment at law. If the equitable grounds set forth are not sufficient to set aside the judgment, the petition would be dismissed on exceptions, and the former judgment left in force to be executed as a valid judgment.
3. **PRACTICE—TRIAL BY JURY.**—In an equitable proceeding to set aside a judgment rendered in a proceeding at law, the practice of having two trials—one to determine whether the judgment shall be set aside, and the other to retry the original suit after the judgment rendered in it has been set aside—is not adapted to our mode of procedure, in which all the material facts must be submitted to a jury, when the same is demanded, whether the suit involves matters of law or equity.
4. **JUDGMENT.**—A proceeding in equity, to set aside a judgment rendered in an ordinary action at law, cannot be maintained on the ground of irregularity, committed in the proceedings on which the judgment was rendered; a substantial injury must be shown.
5. **ATTORNEY.**—Although an attorney at law, as such, has, strictly speaking, no right to make a compromise, yet a court will be disinclined to disturb one, which was not so unreasonable in itself as to be exclaimed against by all, and to create the impression that the attorney's judgment had been imposed upon, or not fairly exercised. The conduct of the party seeking to be relieved against his attorney should have been perfectly blameless.
6. **PLEADING—JUDGMENT.**—A petition in equity, which seeks to enjoin a judgment, upon the ground that the plaintiff's counsel had, in the proceedings on which the judgment was rendered, consented, without authority, to give a lien upon land upon a part of which the plaintiff alleged his homestead was situated, would, if true, entitle him to be relieved, if at all, only to the extent of the homestead. As to the other lands specified in the judgment, it might, in the absence of averment to the contrary, have been a lien, without it being so stipulated in the judgment.

Statement of the case.

APPEAL from Freestone. Tried below before the Hon. John B. Rector.

Robert Adams executed his note to George Roller, the appellant, for the sum of \$7,000, due one day after date, with six per cent. interest from date, dated in July, 1862.

In 1865, a credit of \$1,400 was entered on the note, and on October 15, 1866, Roller brought suit on it, against Adams, in the District Court of Freestone county, for the balance due.

Adams answered, that the note was given for Confederate money, and that the payment he had made on the note, of \$1,000, specie, equal to \$1,400, currency, had more than paid the note. He asked for judgment for the balance due him, and claimed, also, damages in reconvention, against Roller, to the amount of \$10,000, for having brought suit on this note. He further pleaded, that, at the maturity of the note, Confederate money was worth twenty for one, but he did not attack the consideration, as illegal.

On November 10, 1866, by written agreement between the attorneys of Roller and Adams, a judgment by default was taken in favor of Roller, against Adams, for \$7,000, currency, without interest, for four years, and a stay of execution for that period, with a special lien reserved, by agreement, in favor of Roller, on 1,599 acres of land in Freestone county.

On July 2, 1868, Adams filed an original bill, in the nature of a bill for a new trial, for the purpose of canceling and setting aside the judgment rendered against him. The grounds set up for vacating the judgment and granting a new trial, were, that as the note was given for Confederate money, the whole transaction was tainted with illegality; that the act of November 10, 1866, (Paschal's Dig., art. 7440,) providing for the value of Confederate money to be ascertained and made the basis of judicial proceedings, was null and void, contrary to the Constitution of the United States and to public policy, and that the agreement under which the judgment was ren-

Statement of the case.

dered was also null and void, and entered into by his attorneys without his knowledge or consent.

Adams also filed the affidavit of one of his attorneys, that he had made the agreement for him without his knowledge, but believing it to be the best course for him.

Roller filed a general and special demurrer to this petition for a new trial. He also filed an answer, setting up, that the judgment was rendered with the full knowledge and consent of Adams; and that he, Adams, had himself drafted its outlines, as it was charged, appeared from a memorandum of Adams, marked Exhibit A, in his handwriting; and that his attorney knew this, and that, in the former suit, he had plead that Confederate money was not worth more than twenty for one, and that he had an opportunity to prove this, but had failed to do so. Roller further alleged that Adams borrowed this money from him to buy, of one Mr. Huckaby, the same land on which the lien was retained in the judgment.

The demurrer of Roller was overruled on the 8th of March, 1869, at which time a bill of exceptions was taken to this action of the court. At the next term, a motion was made to reopen the argument on the demurrer, and, on this re-argument, at the February Term, 1870, the former ruling was set aside, the demurrer sustained, and the bill for a new trial dismissed.

From this final judgment, dismissing the bill, Adams having in the meanwhile become a bankrupt, one Standifer sued out a writ of error to this court, pending which he ceased to be assignee, and Rowand was substituted for him, who was succeeded by Wooldridge.

On the 19th of March, 1872, the Supreme Court reversed the case and remanded it for a new trial. (*Adams v. Roller*, 35 Tex., 711.)

The opinion in that case seems chiefly based upon the idea that the judgment entered by consent was not such a judgment as the attorneys of Adams had the power to enter, and that it was null and void.

On the return of the case to the District Court, Roller moved to dismiss it, which was overruled.

On the 17th of May, 1872, the cause again came up for trial, when, as appears from the appellant's bill of exceptions, the court below having overruled the appellant's motion to dismiss and his demurrers to the petition, refused to allow him a jury in the case, and proceeded to try the bill for a new trial, without one.

The appellant moved for a new trial, which was refused.

On May 17, 1872, the assignee set up, in an amended answer, the defense, that Confederate money was an unlawful consideration for a contract, and to this defense Adams himself came forward and made oath.

There was a trial on the 23d of August, 1872, and a verdict and judgment in favor of Roller. A new trial was granted, and the case again tried December 21, 1872, when, for the third time, a judgment was rendered in favor of Roller, which the court again set aside.

On the 12th of August, 1873, the case was again tried, and a jury gave a verdict against the appellant, on which a judgment was entered dismissing the cause, to correct which the writ of error in this cause was sued out.

Hancock, West & North, for plaintiff in error.—The petition for a new trial, by which Adams sought to escape from the effect of the judgment of November 10, 1866, was manifestly insufficient in its averments for the purposes intended. It charged no fraud or collusion. It showed on its face inexcusable *laches* and delay on the part of Adams, he not having moved for nearly two years, when he knew of the judgment a few weeks after its rendition. It showed on its face that Adams was justly indebted to Roller for the value of the Confederate money, while he tendered back no money, offered to pay nothing, but sought to defeat the payment of the whole debt by asserting its illegality and denying his liability for any amount. (1 Story's Eq., sec. 64e.)

Argument for the plaintiff in error.

The argument of our associate, incorporated in the record, is full and satisfactory on this point. The following authorities show the insufficiency of the petition: *Goss v. McClaren*, 17 Tex., 107; *Vardeman v. Edwards*, 21 Tex., 742; *Burnley v. Rice*, 21 Tex., 180; *Steinlein v. Dial*, 10 Tex., 268; *Gregg v. Bankhead*, 22 Tex., 252; *Cook v. De la Garza*, 13 Tex., 444; *Spencer v. Kinnard*, 12 Tex., 180; *Metzger v. Wendler*, 35 Tex., 379; *Ragsdale v. Green*, 36 Tex., 194; *Fisk v. Miller*, 20 Tex., 572; *Caperton v. Wanslow*, 18 Tex., 125; 1 Bac. Ab., title ATTORNEY, letter C, 487-491; 1 Bouvier Law Dic., 140.

The case of *Holker v. Parker*, 7 Cranch, 436, cited in the former opinion, will be found, on an examination of the facts of the case as set forth, to be inapplicable to the case at bar, and we trust the court will carefully consider the facts in that case. The following authorities are believed to be conclusive in our favor: *Dunman v. Hartwell*, 9 Tex., 496; *Cayce v. Powell*, 20 Tex., 767, (a strong case in point;) *Storey v. Nichols*, 22 Tex., 90; *Hopkins v. Donaho*, 4 Tex., 337; *Pierson v. Burney*, 15 Tex., 273; *Cartwright v. Roff*, 1 Tex., 81; *Prewitt v. Perry*, 6 Tex., 262; *Wheeler v. Pope*, 5 Tex., 263; *Burton v. Lawrence*, 4 Tex., 374; *Merritt v. Clow*, 2 Tex., 582.*

There are other palpable errors, such as the refusal of the court to allow Roller the benefit of a jury. (See the case of *Russell v. Miller*, MSS. Op., at this term, by Judge Reeves, delivered May 5, 1874, No. 1855, from Houston county, as to refusing a jury when one is demanded.)

But as Adams has become a bankrupt, unless Roller can be protected by his judgment of November 10, 1866, he will lose his debt. This would be a great hardship on him, for it

*NOTE.—We omit the able argument of counsel antagonizing what was, at the time of filing their brief, the decision of the court as formerly constituted, in regard to contracts based on Confederate money. The views of counsel have been so often on this subject sustained by the present court, that we omit their argument.

Argument for the defendant in error.

appears from the record that he took the Confederate money, at par, for debts due him; that he loaned it to Adams, and Adams paid the money to Huckaby for the very land on which the judgment is a lien.

If, now, Adams can hold Huckaby's land, and escape the payment of his debt to Roller, he will get his land for nothing. Certainly he has no equity on his side, and does not appear in an enviable light in the record.

Theodore Jones, also for plaintiff in error, on the question of the power of an attorney to consent to a judgment, cited *Paxton v. Cobb*, 2 La., 140; *Cartwright v. Roff*, 1 Tex., 81; *Burton v. Lawrence*, 4 Tex., 373; *Prewitt v. Perry*, 6 Tex., 262; *Burton v. Varnell*, 1 Tex., 635. He maintained that the judgment agreed to by the attorney cannot, in the absence of fraud, be impeached by a mere allegation of want of authority in the attorney, his client being estopped, by the judgment of the court, from denying his authority, citing *Cannon v. Hemphill*, 7 Tex., 184-203; *Dunman v. Hartwell*, 9 Tex., 495, 496; *Cayce v. Powell*, 20 Tex., 767; *Baxter v. Dear*, 24 Tex., 17-21.

Walton, Green & Hill, for defendant in error.—From every definition of the elementary writers, and by the decision of our own court, we must conclude that the judgment first appealed from was a final judgment, as it dismissed the petition and put an end to the suit. (Freeman, sec. 16.)

A reversal, therefore, of such final judgment must be final in its nature, so far as the questions necessary to the decision were passed upon by the appellate court; and all that was left to be done, upon the remanding of the cause to the District Court, was for that court to carry out the judgment of the appellate tribunal; and such a judgment is so potent, that the Supreme Court itself cannot reinvestigate the question decided.

The question here discussed is well stated by Freeman, sec.

Argument for the defendant in error.

267. Speaking of judgments on demurrer, he says, that such a judgment "is conclusive of everything necessarily determined by such judgment;" that such a judgment may be on the merits, and "if so, its effect is as conclusive as though the facts set forth in the complaint were admitted by the parties or established by evidence;" that, as no action could be maintained by the plaintiff on the same facts in case judgment be against him, so, "if any court err in sustaining a demurrer and entering judgment for defendant thereon, when the complaint is sufficient, the judgment is nevertheless 'on the merits.' It is final and conclusive until reversed on appeal."

As a result, the reversal of such a judgment carries the same force and consequence with it.

In the case of *Chambers v. Hodges*, 3 Tex., 528, Justice Wheeler, commenting on the effect of judgments in the Supreme Court, says: "That inferior courts could not vary the decree or examine it for any other purpose than execution, or give any other or further relief, or revise it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded:" citing, 3 Dow., P. C., 157; *Himely v. Rose*, 5 Cranch, 316; *Browder v. M'Arthur*, 7 Wheat., 58; *The Santa Maria*, 10 Wheat., 443.

This principle is fully sustained, by reason as well as authority. Nor can this court review or revise its own judgments, after the term, except for clerical errors, or they be void for want of jurisdiction. (*Chambers v. Hodges*, 3 Tex., 528, and authorities cited.) The learned judge, in that case, states the reason of the rule forcibly. He says: "There must be some period at which litigation shall cease, and controverted rights be formally disposed of and settled, and this period seems, on principle, to be cotemporaneous with the accomplishment of the act for which the power has been exerted."

What have we here, then? We answer, a reversal upon

Argument for the defendant in error.

the questions, not only of the propriety, but sufficiency of the petition for a new trial; a judgment which decides necessarily that if the facts stated in the petition be proved, the agreement between the attorneys for the judgment rendered was totally unauthorized, and would be ground for setting aside the judgment of 1866; also, that the equities stated in the bill were good, if proved, and that Confederate money was not a consideration for a contract.

There was nothing left, upon the reversal, to be done, but that the court below should carry out the judgment of the Supreme Court; and nothing remains now in the present appeal but to determine whether the decree of the Supreme Court has been executed.

Independently, however, of the rule we have been discussing, we think the decision of the Supreme Court in the former case was proper.

Justice Wheeler, in *Merritt v. Clow*, 2 Tex., 588, commenting on the opinion of the majority of the court, in *Denton v. Noyes*, 6 Johns. R., 295, says: "But a different doctrine has been maintained elsewhere, and, we think, with much better reason;" and the court conclude that the attorney will be presumed to have authority, but his want of authority may be shown, and will be cause for setting aside the judgment.

In the case of *Denman v. Hartwell*, 9 Tex., 496, it appeared the agreement was made by the attorneys, but no objection was raised on that ground. No question was raised as to their power; and the court say: "That they had competent authority, must be presumed, until it is impugned, and the contrary appears; * * * and the judgment must be taken as having been agreed to by the parties themselves."

The language of this case affirms the doctrine laid down in *Merritt v. Clow*, and shows that, in a direct proceeding, the authority of the attorney may be impugned, and his want of authority be shown. (*Freem. on Judg.*, sec. 128; *Shumway v. Stillman*, 6 Wend., 453; *Sharp v. Mayor of New York*, 31 Barb., 578; *Hess v. Cole*, 3 Zab., 125; *Shelton v.*

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Tiffin, 6 How., (U. S.,) 186; *Watson v. Hopkins*, 27 Tex., 642; *Holker v. Parker*, 7 Cranch, 436.)

Counsel discussed at length the authorities cited by plaintiff in error; also, the Confederate treasury-notes question.

ROBERTS, CHIEF JUSTICE.—The plaintiff in error obtained a judgment against Robert Adams, in the District Court, on the 15th day of October, 1866, for the sum of seven thousand dollars, in United States currency, and for a lien on certain lands, (1599 acres,) with a stay of execution for four years, without bearing interest during that time. On the 2d day of July, 1868, the said Adams filed a petition, asking the court to set aside said judgment and grant him a new trial, on the grounds that the note upon which said judgment was rendered, was executed for and in consideration of the loan of that amount of Confederate treasury notes, and was payable in said currency, though not so expressed in the note, and that the attorneys, whom he employed to make his defense in the suit, in which said judgment was rendered, consented and agreed to said judgment without any authority from him to make any such agreement, and that he had never ratified the same as an agreement binding upon him.

In an amendment, he alleged further, that the attorney for the plaintiff was informed by his counsel that they had no such authority; and that he took said judgment, by their consent, upon the risk that the said agreement should be ratified by him; and that he had objected to it when first informed of it, and had never ratified it.

Roller filed general and special exceptions to this petition; and also set up in his answer, facts in opposition to it.

Without detailing the matters that transpired previously, the court finally overruled the exceptions, heard and determined the facts without a jury, set aside the judgment that had been rendered in favor of Roller, and granted a new trial in said cause. To all this, Roller excepted, as appears by bill of exceptions in the transcript.

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The original cause having been redocketed, the defendant therein, the assignee of Adams, who had been made a party, filed an amended answer, which stated, in substance, that the note sued on was executed for the loan of Confederate States treasury notes, and was payable in said currency. Roller excepted to this answer as insufficient, and his exception was overruled. Upon the trial of the case, upon the issue presented by this answer, and the facts being proved by the evidence of Adams as therein alleged, a verdict was rendered for the defendant, and judgment rendered against Roller, that he take nothing by his suit, and pay the cost.

In the case of *Mathews v. Rucker*, it was decided by this court that a contract was not void because it was payable in Confederate treasury notes, from which it would also follow that such notes would be a valuable consideration upon which to sustain a contract. (41 Tex., 636; *Thorington v. Smith*, 8 Wall., 1.)

Therefore, the exceptions to the answer, as pleaded in this new trial, should have been sustained. Not being good as an entire defense to the action, to make it available as a partial defense, it should have stated further, the value of such treasury notes. But the proof made and the charge given, show that the case was decided wholly upon the illegality of the contract, because the consideration upon which it was based was the loan of Confederate treasury notes.

The mode of proceeding, in granting the new trial, was also erroneous. If Adams, in his petition, had stated good, equitable grounds for setting aside the judgment, which was a judgment in an ordinary action at law, the exceptions to it for want of equity should have been overruled, not for the purpose of granting a new trial, but that this suit in equity, as an original proceeding, for relief against a judgment at law, might be tried as any other suit, seeking equitable relief. The rule here announced was definitely settled by this court, in the case of *Taylor, Knapp & Co. v. Fore*, 42 Tex., 256.

If, on the other hand, the equitable grounds set forth in

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the petition were not sufficient to set aside the judgment, upon its being excepted to and dismissed for want of equity, the judgment would be left standing, to be executed as a valid judgment.

In the case last cited, the authority of both Kent and Story is shown against the mode of proceeding adopted in this case, of having two trials, one to determine whether or not the judgment shall be set aside, and the other, to retry the original suit after the judgment in it has been set aside. It is certainly not adapted to our mode of trials, wherein all of the material facts may have to be submitted to a jury, when demanded, whether the suit involves matters of law or equity.

The question remains to be considered, were there sufficient equitable grounds set out in the petition of Adams, to set aside the judgment that he complained of.

Any mere irregularity in the mode of procuring the judgment is not sufficient. A substantial injury must be shown. Hence it is said by Chief Justice Marshall, that "although an attorney-at-law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one, which was not so unreasonable in itself, as to be exclaimed against by all, and to create an impression that the attorney's judgment had been imposed on, or not fairly exercised; and the conduct of the party seeking to be relieved against the compromise of his attorney, should have been perfectly blameless." (*Holker v. Parker*, 7 Cranch., 436.)

It is evident that the main ground of injury complained of was, in having a judgment rendered against him on a note that was wholly illegal and void, because it was given for Confederate treasury notes. He does not allege, in the petition, that such notes, at the time the note was given and fell due, were, in the market, worthless, or so far below par as that the arrangement made by his counsel for him was injurious to his interests. Under the rule now enforced in this court, as well as in the Supreme Court of the United States, there is nothing stated in the petition on this subject that

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shows otherwise than that it was in fact greatly to his advantage.

The only other ground of injury that he could complain of was, that his counsel had consented, without authority, to give a lien upon land upon which he alleges that his homestead was situated. For, upon the other land, the judgment may have been a lien, without it being stipulated in the judgment. To that extent he might, in equity, be entitled to have the judgment enjoined, without interfering with the other provisions of it.

Inasmuch as this case has not been brought and tried in the court below, upon rules of law and of procedure now held by this court to be correct, it is deemed proper to remand it, so that, if, in accordance with the rules here laid down, a substantial injury can be alleged, (in addition to the other equitable facts that have been alleged,) and shown by proof, the party complaining may have the opportunity of doing it, and obtain the appropriate remedy. (*Taylor v. Fore*, 42 Tex., 256.)

For the errors that have been pointed out, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

P. J. WILLIS & BRO. v. GREEN FERGUSON.

1. ESTATES OF DECEDENTS—EXECUTOR—JUDGMENT.—The validity of a judgment, rendered in a court of general jurisdiction, against one named in a will as executrix and sole legatee, after the failure of the executrix to file an inventory of the estate, which judgment recites that she is executrix, and directs the issuance of execution against the executor to sell the property of the estate to satisfy the judgment, however erroneous it may have been, had an appeal been prosecuted, is not a nullity, and cannot be attacked in a collateral proceeding.
2. SAME —When there has been long-continued action of such an ex-

Argument for the appellee.

executrix, in the obvious capacity of an independent executrix, after failure to return an inventory of the estate, as required by law, and neither the court having jurisdiction, nor creditors interested, have required a compliance with the statute, those who have, in good faith, acquired property of the estate, through the action of the executrix, as such, will not be permitted to suffer on account of a failure to file the inventory.

3. It was made the duty of the court by the law in force (Pascal's Dig., arts. 1294, 1295) to remove the executrix upon failure to return an inventory within sixty days from the grant of letters; and if creditors who were interested, and the court also, failed to require it, persons who acquired rights through her action in the capacity of executrix, should not be held to suffer an injury by her default, and by that of the court, in not furnishing a better security for her faithful discharge of duty.
4. **DISTINGUISHED.**—Distinguished from *Langley v. Harris*, 23 Tex., 564.
5. **EVIDENCE—ADMINISTRATOR'S DEED.**—A deed from an administrator was excluded from the jury, on objection being made that the grant of letters of administration to him was a nullity, because, prior to the issuance of letters, another person, named as executrix in the will, continued to discharge the duties of executrix, and no vacancy existed in the administration which would authorize the appointment of the grantor in the deed. The progress of the case disclosed, that the continuance of the party named as executrix, to discharge her duties as such, when the administrator was appointed, was a controverted fact: *Held*, That the exclusion of the deed was error.

APPEAL from Montgomery. Tried below before the Hon. James Masterson.

The opinion states the case.

N. H. & J. R. Davis, for appellees, on the conclusiveness of judgments, cited 10 Wall., 309, 581; *Jackson v. De Lancey*, 13 Johns., 537; *Sutherland v. DeLeon*, 1 Tex., 309; *Mitchell v. Meuley*, 32 Tex., 465; *Withers v. Patterson*, 27 Tex., 495.

L. A. Abercrombie, for appellee.—Was the appointment of an administrator, with the will annexed, void, for want of jurisdiction in the court to make it?—for nothing else will

Argument for the appellee.

make it void. When the court has jurisdiction of the subject-matter, every presumption is in favor of its judgment. (*Townsend v. Munger*, 9 Tex., 309.) That the court had jurisdiction of the subject-matter, will not be denied, if the will is not independent in its character. If independent, it is quite as evident that it had jurisdiction of the subject-matter after the expiration of sixty days from the date of appointment, the executrix having refused or declined to render an inventory. The court not only had jurisdiction to remove her, but it was its peremptory duty to do so. In this respect, this case will be found to differ widely and materially from the case of *Griffith v. Frazier*, 8 Cranch, 9, and the cases therein put by Chief Justice Marshall. The appointment of an administrator over the estate of a man who is living, is void, because the court has no jurisdiction of the subject-matter. So in the case where an executor has been appointed, and is in the discharge of his duties; also, when the court is not clothed with power to remove him—when the law vests in him the title to the personalty, of which he cannot be divested by the court of ordinary, but only by a court of chancery. (*Fisk v. Norvel*, 9 Tex., 13.)

Here the court has express power to remove; the executrix has no title as such in any of the property. She is not only not executing the trust, but she positively refuses to do so. The distinction is so obvious, to elaborate it further would seem to be disrespectful to the court.

In *Withers v. Patterson*, 27 Tex., 492, referred to by appellants in their brief, it will be seen that the estate had been fully administered, and the court, therefore, considering that the record showed there was no estate to be administered, held that grant of letters was as much a nullity as to grant letters of administration on a living man's estate.

Now, then, here is a court of competent jurisdiction, and with express jurisdiction over the subject-matter, appointing an administrator over a large estate wholly unadministered, with the knowledge, consent, and at the request of the former

Argument for the appellee.

executrix. He qualifies as such. The former executrix applies to the court in this administration to set aside to her the homestead, and repeatedly does other acts recognizing said administration, extending through many years. Creditors recognize him as such by presenting their claims to him for allowance, and suing him in the capacity of administrator when he rejects them, and by appearing in the Probate Court, and there litigating with him as such administrator. The court orders him to sell lands; approves or disapproves the sales when made. Purchasers in good faith pay him their money, which goes into the estate. And now the court, more than five years after his appointment as administrator, is called upon by creditors who, themselves, have recognized his appointment, and who, as creditors of said estate, have possessed themselves of almost the entire valuable estate of Lewis, to declare that appointment, and all subsequent proceedings thereunder, absolutely null and void, and to eject appellee from this small tract, his homestead, purchased in good faith under order of the court, in an administration then, and for many years after, universally recognized as legal and proper. And why? Because, it is said, it does not appear from the minutes of the court that a formal entry was made removing the executrix, or that she had tendered her formal, written resignation, and that it was accepted.

Mere irregularities in the proceedings had in granting letters or orders of sale, or omissions that do not appear to be supplied, will not vitiate the grant of letters or orders of sale, if the court had jurisdiction of the subject-matter. (*Giddings v. Steele*, 28 Tex., 750; *Baker v. Coe*, 20 Tex., 429; *Dancy v. Stricklinge*, 15 Tex., 557.) "The validity, or the necessity of the proceedings in the court of probate, for the appointment of an administrator, cannot be drawn in question collaterally by a debtor of a succession." (*Mix v. Johnson*, 9 La. An., 113; *Grant v. McKinney*, 36 Tex., 62.) The same rule prevails when the "administrator's authority is drawn in question in a collateral action for the purpose of

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invalidating the title of a purchaser at the administrator's sale. Where sales have been thus made and confirmed by the judgment of a court of competent jurisdiction, it is well settled that the judgment, unless impeached for fraud, cannot be drawn in question in any collateral action or proceeding. (*Burdett v. Silsbee*, 15 Tex., 617; *McPherson v. Cunliff*, 11 Serg. & Rawles, 422; *Thompson v. Tolmie*, 2 Peters, 157; *Tucker v. Harris*, 13 Ga., 1; 15 Tex., 557; *Poor v. Boyce*, 12 Tex., 450; *Hurt v. Horton*, 12 Tex., 285.)

ROBERTS, CHIEF JUSTICE.—This was an action of trespass to try title to three hundred acres of land—the Peel tract—brought by appellants against appellee on the 23d of March, 1873. The petition was in ordinary form, and the appellee filed a plea of not guilty. Under the issue thus formed, the title relied on by each party is presented in the evidence offered upon the trial.

The court, in the charge, held the plaintiffs' evidence of title insufficient, excluded from the jury the defendant's evidence of title, and, upon the admitted fact of defendant's possession of the land when the suit was brought, directed the jury to find a verdict for the defendant. Plaintiffs appealed, and assigned numerous errors, which point out all of the objections which could be raised to the rulings and charge of the court. The defendant excepted to the ruling of the court, in excluding the evidence of his title, and assigned errors, in order to have the validity of his title passed upon by this court.

The evidence before the jury, relating to the plaintiffs' title, was, a judgment, execution, and sale, and sheriff's deed to the land, and other facts herein set forth. The said judgment was rendered by the District Court of Montgomery county, on the 10th of September, 1872, wherein plaintiffs recovered a judgment, for twenty-eight thousand dollars, against Susan M. Lewis, as "independent" executrix of the will of John M. Lewis, sr., to be collected by execution, to

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be levied upon the effects in her hands, being the community property of herself and her deceased husband, the testator, John M. Lewis, sr. In said judgment, it was decreed that she was still said executrix, in control of said property, and that John M. Lewis, jr., who was a party to the suit, had no right to control the same, by having been previously appointed administrator of said estate, with the will annexed; that his acts as such were null and void, and that he be enjoined from interfering with the same. The execution, levy, sale, and sheriff's deed to plaintiffs were all in pursuance of said judgment, and completed before the institution of this suit for the land. It was also proved that John M. Lewis, sr., died in 1862, leaving a will, in which he bequeathed and devised all of his property to his wife, Susan M. Lewis, with the power of disposition during her lifetime, and made her sole and exclusive executrix of it. In the same year she applied for probate of the will, had it probated, and letters of executorship were issued to her upon her taking the oath. In the letters, she was directed to return an inventory of the estate, and appraisers were appointed by the court; but she never returned any inventory. It was shown by her depositions that she took possession and control of all the property of the estate, settled debts, and otherwise managed it, without the control of the County Court, the estate being large and amply solvent, up to the close of the war. It was shown by the evidence of John M. Lewis, jr., introduced by the defendant, that he had applied for and obtained letters of administration upon the estate, with the approbation of his mother, Susan M. Lewis, previous to this judgment, in 1872, (as shown in defendant's rejected evidence, in 1867.) It was not shown that she had ever resigned the executorship, or that any order had ever been made displacing her from that trust; but her and her son's evidence were offered, as tending to show, by her not filing an inventory, and other facts, that she had abandoned it before letters of administration were granted to her son, John M. Lewis, jr. It was admitted that

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the land sued for was community property of John M. and Susan M. Lewis at the time of his death.

Upon the evidence, of which this is a substantial outline, the court charged the jury, that, as Susan M. Lewis had failed to file an inventory of the estate, the judgment of 1872 was a nullity, so far as it ordered execution to issue against her, as independent executrix, to sell the property of the estate, and that plaintiff could acquire no title under the execution and sale of the land in controversy, issued upon said judgment.

We think this was erroneous. Because that very thing was adjudged otherwise by a court having power to render such a judgment, as between the parties to it, to wit, the plaintiffs, Susan M. and John M. Lewis, jr. Not having been reversed or appealed from, we must presume it to have been rendered upon sufficient facts, judicially ascertained. And if the facts could be known to have been insufficient, the power to render it existing, and the want of jurisdiction not appearing, the judgment would not be a nullity, however erroneous it might have been upon an appeal taken from it by the parties to it.

The defendant Ferguson, the evidence of his title being excluded, stood, in this case, as a naked possessor of the land, and had no right collaterally to attack the judgment, unless it had been a nullity.

But if this question were not concluded, as the facts stood before the jury, we are not prepared to say that there might not exist such a state of case, by the long-continued action of the executrix in the obvious capacity of an independent executrix under the will, as that she and the estate might be held bound in that capacity, notwithstanding she had failed to return an inventory, when no proceedings had been instituted in court against her for such default. (Paschal's Dig., art. 1371.) It was made the duty of the court, by the law then in force, to remove the executrix upon failure to return an inventory within sixty days from the grant of letters.

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Creditors and others interested in the estate might have required it to be done for their own security, which is its object. But if they failed, and the court failed to require it, persons who acquired rights through her action in that capacity, should not be held to suffer an injury by her default and by that of the court in not furnishing a better security for her faithful discharge of her duty. (Paschal's Dig., arts. 1294, 1295.)

The case cited to support the court's charge fails to do so. (*Langley v. Harris*, 23 Tex., 564.) In that case, the executor failed to accept the trust, and it was held that the administrator, with the will annexed, was subject to the action and control of the court, the same as though no executor had been named in the will, with the special power of administering the estate prescribed in art. 1371, Paschal's Dig.

It is unnecessary, however, to consider this further, inasmuch as by the judgment of 1872, under which plaintiffs derive title, it was adjudged that, by a proper construction of the will, she was by it made an independent executrix; that she held the property of the estate in that capacity, and that it was subject to execution in satisfaction of that judgment, then and thereby establishing a debt against said estate in favor of plaintiffs, which is conclusive against a trespasser or a naked possessor.

The evidence of defendant's title was, an application of John M. Lewis, jr., for letters of administration in 1867, representing that his mother, Susan M. Lewis, had abandoned the administration of said estate as executrix; grant of letters, order of sale in 1869, and sale, confirmation, and deed of administrator, in 1870, to McCaleb; and in the same year a deed from McCaleb to defendant Ferguson, and his possession under it up to the time of bringing this suit.

This evidence was excluded, upon objections by the plaintiffs, upon the ground, as shown by the defendant's exceptions, as well as in the charge of the court to the jury, that the grant of letters of administration to John M. Lewis, jr.,

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was a nullity, and all of his acts under said grant were void, because Susan M. Lewis continued to be executrix under her appointment, and there had never, up to the trial, been a vacancy in the administration to be filled by his appointment.

To make this ruling, the court had to assume a fact to have been indisputably established, which, it is evident, from the tendency of the evidence offered by the defendant and admitted to go to the jury, was a fact contested, which was, that Susan M. Lewis continued to act as executrix under the will, in the control and management of the estate. This ruling seemed to proceed upon the opinion, that the absence of a resignation by her, or of an order of removal by the court, conclusively established that fact. One or the other of these would certainly be the appropriate evidence of the abandonment of the trust by her. Still, it does not follow that a court of competent jurisdiction, called upon directly to act upon and determine it—as was done in the application for letters of administration by John M. Lewis, jr., in 1867—might not arrive at and determine the fact of her abandonment upon other and different evidence of it; and we might safely say that, ordinarily, the act of granting letters of administration upon such an application might well raise the presumption that it had been determined, upon some competent evidence, in the absence of proof to the contrary, sufficiently apparent upon the record, to vitiate the proceeding.

Had this evidence been admitted, it would have shown an interest in the defendant to the land, anterior to the rendition of the judgment of 1872, under which the plaintiffs claim their title, which would have relieved defendant from the attitude of a naked possessor, and have required the plaintiffs to have shown additional facts, not developed in this case, which would either reach back to maintain the validity of the plaintiffs' title or would have the effect to vitiate the title of the defendant. Such facts may or may not exist

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which would be competent to establish the one or the other object. The judgment of 1872 recites the fact that there had been an attachment of lands in that suit, and it releases the lien on some lands and fixes the lien on others, in a way not very intelligible in reference to the facts in evidence in this case. Nor does it appear from that judgment, or from any evidence in this case, when the suit in which said judgment was rendered was brought. (From other cases in this court, it is shown to have been brought in 1868.) Enough has been said to show that, by the rulings and charge of the court, the proceedings in the investigation of this case have been arrested before the transactions upon which its real merits depend had been reached, which, not having been brought out and passed upon in the court below, should not be anticipated here now by this court.

This opinion applies also to the cases of *Goldthwaite v. Ferguson*, and *Willis & Bro. v. Lewis et al.*

For the errors in the charge of the court, as indicated in this opinion, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

RACHEL RODGERS v. J. R. BASS AND WIFE.

1. CONFEDERATE MONEY.—The use of Confederate States notes in private transactions between parties, where it circulated, did not affect such transactions with any taint of illegality or fraud. Within the Confederacy, it was the only circulating medium, and was generally received and passed as money, or token of value, by which debts were paid and exchanges effected.
2. SAME.—Neither executory or executed contracts can be held illegal or void because based on Confederate States treasury notes, and, where of importance in adjudicating such contracts, its value at the time and place where the contract was made should be shown, and the effect of payments and investments in it, by agents, representatives, and trustees, must depend in the main upon the facts and circumstances of each particular transaction.

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3. **CONFEDERATE WAR—INTERNATIONAL LAW.**—It is a rule of international law, that war suspends, for the time, all friendly intercourse between citizens of hostile States; that, while it continues, no kind of business or commercial intercourse can be legitimately transacted by citizens of the one with those of the other; it dissolves commercial partnerships, at the breaking out of hostilities, between citizens of the States in conflict, and revokes the authority of agents in regard to transactions not agreed upon and in part executed. But war does not suspend authority for the collection of a debt, given previous to the beginning of hostilities, by a citizen of one of the hostile States, to an agent, who, as well as the debtor, resides in the other.
4. **POWER TO COLLECT DEBTS.**—The power to collect a note, given for the payment of the purchase-money of land, may be inferred from the authority to sell the land and take the note in payment for it.
5. **PAYMENT.**—In the absence of special instructions to an agent to collect in gold or silver currency, a payment to the agent, in bank bills, or other currency generally taken and used in the payment of debts, and current in business transactions as money, would satisfy the debt.
6. **POWER TO COLLECT.**—The legal inference from the authority of an agent to collect a debt is, that he is authorized to receive money, current and at par with coin, usually received, in like transactions, by the community in general where the debt is paid.
7. **SAME.**—Such agent has no authority to sell, or barter, or exchange the note to the debtor, or to any one else, for drafts, bills of exchange, or real property.
8. **SAME—MONEY.**—Unless the language of the power to collect is qualified or restricted, it should be held as authority to authorize the receipt of currency and bills recognized, in general circulation, as money, rather than to such gold and silver coin, or notes and bills, as are, by the Constitution and laws, declared a legal tender.
9. **CONFEDERATE NOTES.**—Tested by these rules, in February, 1862, Confederate States treasury notes, in Texas, must be held to have been current tokens or bills, used and passing, in business transactions, as money; and, ordinarily, an agent, to collect, could receive such notes in payment, unless forbidden by his principal.
10. **PAYMENT IN CONFEDERATE STATES NOTES.**—Such payment held good, where made by the maker of a promissory note to the payee, who, as agent, sold the maker of the note land for which the note was executed, in the absence of notice from the owner of the land, that payment to the agent (the payee of the note) would be in fraud of the rights of such equitable owner.
11. **LEGAL OWNER OF PROMISSORY NOTE.**—Such owner may collect,

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and the maker cannot resist an action by such holder, on the ground that some other is the equitable owner.

12. SAME.—Hence, when such legal owner has received payment in the scope of his general authority, the equitable owner cannot maintain suit, and recover again, from the maker.

APPEAL from Gonzales. Tried below before the Hon. John P. White.

The opinion states the case.

L. H. Plancke and Miller & Sayers, for appellant.—The record, divested of all surplusage, presents to this court but two questions for its adjudication:

1. Whether James A. Mason had authority to act as the agent and attorney of this appellant, Rachel Rodgers, at the date of the payment of the note which became due 20th of February, 1861, to wit, February, 1862?

2. Was the payment of the note to James A. Mason, in February, 1862, by defendant J. R. Bass, in Confederate treasury notes, a valid legal payment of said note, and binding upon this appellant as the owner of the same?

We propose to present this case with a view of applying the foregoing propositions thereto.

I. We submit that it is an historical fact, that at the time of the payment of the note by appellee Bass to Mason, as the pretended agent of the appellant, a state of war existed between the States of the North and the States of the South, which formerly and since composed the United States, and this historical fact has entered into and become a part of the judicial decisions of the highest tribunals of the country since the termination of said war.

That all intercourse and correspondence between parties domiciled in Northern States, in business relations with parties domiciled in the Southern States, was prohibited, as well by a proclamation of the President of the United States as by an act of the Congress of the United States. (See Proclamation of President, August 16, 1861; 12 Stats. at Large, 257;

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also 12 Stats., 1262; 2 Wallace, 258; Id., 404; 6 Id., 1, 521, 532; 7 Wall., 542; 8 Id., 163; 2 Circuit N. Y., 1870; 7 Blatch., 391; also see opinion of Judge Moore, in *Bishop v. Jones & Petty*, 28 Tex., 314.)

It is a geographical fact, of which this court can judicially take cognizance, that the State of New Jersey, the residence of this appellant, from the year 1858 to the date of the filing of this suit, was one of the States of the North, and that Texas, the residence of the defendant J. R. Bass, and of J. A. Mason, the pretended agent of appellant, was one of the Confederate States which was contemplated as being in a state of rebellion by the proclamation of President Lincoln and the act of Congress above referred to. (See Proclamation of 16th August, 1861, and act of Congress of 13th July, 1861; 12 Stats., 257-1262.)

It is submitted, that by virtue of this act of Congress and the proclamation issued thereon on the 16th August, 1861, all commercial and business intercourse between parties living in the territories of the belligerents was prohibited, and thereby became illegal.

The Northern creditor could not receive the sum of his debt from his Southern debtor, nor could the Southern debtor legally pay his Northern creditor. (See *The Kanawha Coal Co. v. The Kanawha and Ohio Coal Co.*, 7 Blatchford, 406, and following; *Tucker v. Watson*, in Court of Appeals of Va., cited; 6 Am. Law Register, 220; *Jackson Ins. Co. v. Stewart*, Id., 732.)

We assume, then, that the power of attorney to J. A. Mason, executed by appellant Rachel Rodgers, on the 3d of April, 1852, by virtue of the existence of a public war between the United States and the Confederate States, was at least suspended during the existence of said war, if not annulled thereby, and the said J. A. Mason became powerless to act as an agent of said appellant to collect the money due her for the note executed for the purchase-money for the land sold by him to appellee before the existence of said public

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war, at the time of payment to him by appellee Bass, to wit, in February, 1862.

II. The payment of the money due on said note, by appellee, though it had been made in the gold or silver coin of the United States to the said Mason as the agent of this appellant, was an illegal and prohibited act, in contravention of the statute of the United States, as well as of the established rules of international law governing the rights of parties domiciled in different belligerent territories, and that appellant would not have been bound by the same. (See *Ransom v. Alexander*, 31 Tex., 443; 12 U. S. Statutes, 257; *Woods v. Toombs*, 36 Tex., 86.)

Nor were the relations of principal and agent ever revived between the said appellant and the said Mason since he died, on the 9th day of September, 1864, before the cessation of hostilities between the United States and the Confederate States, which dated from the proclamation of President Johnson, on the 16th day of August, 1866.

It is submitted, that the payment claimed to have been made to Mason, as agent of appellant, by appellee Bass, in the treasury notes of the Confederate States, was null and void, and not binding upon this appellant. (*Bowles v. Glasgow*, 36 Tex., 94; *Ransom v. Alexander*, 31 Tex., 443; *Story on Agency*, secs. 98, 99, 181, 430; 27 Tex., 574; 21 Tex., 546; 17 Tex., 449; 11 Tex., 764.)

Admit, for the sake of argument, that the power of Mason had not been suspended by the existence of public war between the belligerent parties, the existence of said agency did not authorize him to receive the treasury notes of the Confederate States in payment for the land of this appellant—since that was a class of paper not in existence at the time of the execution of the power; and the receipt of said Confederate money was not authorized by said power; and his act could not be held binding upon this appellant without her special ratification of said act, and she, in her testimony, specially

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ignores any such ratification. (Also see *Turpin v. Sansom*, 36 Tex., 143; *Lacey v. Clements*, 36 Tex., 661.) * * *

All of our courts and law writers have been of the opinion that so long as an agent confined his acts within the powers granted, the principal was bound by them, and could not annul them if he wished to do so. (Story on Agency, secs. 126, 165; *Merriman v. Fulton*, 29 Tex., 106.)

And the principal is only chargeable with such acts of the agent as are within the scope of the authority conferred. (*Smith v. Sublett*, 28 Tex., 171)

If a ratification of the unauthorized acts of an agency are relied upon, they must be proved by the party setting it up. (*Reese v. Medlock*, 27 Tex., 120.)

The only act claimed in the answer of defendant to be a ratification, in this case, was, accepting payment of one of the notes sued on, after the commencement of the suit.

The acceptance of part of a demand, which is admitted to be due by defendant, even before suit, is not a ratification. (*Commercial Bank v. Jones*, 18 Tex., 811.)

Again it is urged, that the taking the notes in the name of Mason was an unlawful act, and that security upon these notes was a ratification of this act, and therefore a ratification of all other unauthorized acts of Mason, including the payment to him of the Confederate money.

The proof shows (see testimony of defendant Bass, Record,) the mere fact of taking the notes in his own name, for convenience, was not unauthorized by the power, nor unlawful. (*Robson v. Tait*, 13 Tex., 273; *Mitchell v. McLemore*, 9 Tex., 153, 154; Story on Agency, sec. 152.)

The power of attorney to Mason, being a full and general power to sell the lands, included the power to collect the notes (Story on Agency, sec. 85) in any money that was a legal tender for debts, and nothing else.

Hence we conclude, that the whole charge in relation to ratification was not authorized by the pleadings and evidence,

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was not correct in law, and compelled the jury to return a verdict for defendant.

Harwood, Conway & Winston, for appellee, cited *Commercial Bank v. Jones*, 18 Tex., 812; *Story on Agency*, secs. 250, 251; *Wright v. Calhoun*, 19 Tex., 422; *Hough v. Richardson*, 3 *Story's R.*, 689; *McAlpin v. Cassidy*, 17 Tex., 451; *Merriman v. Fulton*, 29 Tex., 97; *Ritchie v. Sweet*, 32 Tex., 333; *Burleson v. Cleveland*, 32 Tex., 397; *Reed v. Nelson*, 33 Tex., 471; *Clarke v. Morey*, 10 Johns., 73; *Griswold v. Waddington*, 15 Johns., 64; *Buchanan v. Curry*, 19 Johns., 137; *Deniston v. Imbrie*, 3 Wash. C. C., 396; *Thorington v. Smith*, 8 Wall., —; *N. Y. Life Ins. Co. v. Clopton*, 7 Bush., 179; *King v. Houston*, 4 Call., 259; *Mouseaux v. Urquhart*, 19 La., 485; *Coon v. Penn*, 1 Pet. C. C., 496; *Ward v. Smith*, 7 Wall., 447; *Pridgeon v. Williams*, 21 Grattan, 25; *Myers' Executors v. Zetelle*, 21 Grattan, 733; *Hale v. Wall*, 22 Grattan, 424.

MOORE, ASSOCIATE JUSTICE.—On the 3d day of April, 1852, the appellant, who then resided in the State of Delaware, by letter of attorney, duly executed, authorized James A. Mason to sell a tract of six hundred and sixty-seven acres of land belonging to her, situated in Gonzales county, Texas. On the 20th of February, 1860, said Mason, (who then, and subsequently until his death, in the year 1864, resided in Harris county, Texas,) sold and conveyed said land, under and by virtue of the authority thus conferred, to the appellee, J. R. Bass, in consideration of one thousand dollars cash down, and two notes of said Bass, payable to his, said Mason's, order, for \$883.75 each, with interest at ten per cent. per annum from date, due in one and two years from said February 20, 1860, and secured by a mortgage upon the land.

In the year 1858, appellant removed from Delaware to the county of Camden, State of New Jersey, where she has ever since resided, never at any time having been in the State of

Texas. In the month of February, 1862, Bass, at the solicitation and special request of said Mason, he being still the holder of said notes, paid to him, in said county of Gonzales, in Confederate treasury notes, the full amount of principal and interest then due on the note, payable February 20, 1861.

It appears, from the evidence found in the record, that at the time said payment was made, Confederate currency had just come into circulation in this State, and was received and used in all business transactions as money, no difference being made in business transactions between it and coin; that property of all kinds could be purchased with it at the same rates at which it was held in specie; that Bass had taken the Confederate money, which he paid Mason a few days previous to its payment, for beef cattle sold by him, at "specie prices."

As Mason died while the war between the Southern and Northern States was still being waged, it may be inferred that appellant may not have been fully informed of the payment of the note for some time after the renewal of intercourse between Texas and New Jersey. Be this as it may, the first knowledge which we can say Bass had of objection by appellant to the payment thus made, was by the bringing of this suit, August 27, 1872, whereby she claims that the full amount of principal and interest of both of said notes was unpaid, and belonged to, and justly due her, and asked judgment for the same, and for the foreclosure of said mortgage.

Subsequently to the commencement of the suit, the note, which fell due in 1862, was paid. The controversy is now, therefore, solely in reference to the other note, and turns upon the determination of the inquiry, whether the payment of it to Mason, by appellee, at the time this was done, in Confederate treasury notes, should be held to be a valid payment and satisfaction of the debt evidenced by it.

The circumstances which brought, what is usually called Confederate money, into circulation; the character of the transaction of which, so to speak, it was an essential part; the popular feeling of the great mass of the people where

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it circulated, and belief that it was necessary, as long as possible, to give it currency, and thereby aid the Government by which it was issued; and, notwithstanding this feeling, its fluctuations, and rapid depreciation, and ultimate entire worthlessness, especially while the fierce passions aroused by the struggle which brought it into existence and kept it in circulation, and while its heart-burnings and bitter memories still inflamed the passions and clouded the judgment,—were well calculated to lead to differences of opinion in regard to it, and the light in which transactions into which it entered should be viewed by the courts when called to act upon them. These differences have been found in our own court, as well as elsewhere. It seems, however, to be now generally admitted that its use in private transactions, between parties where it circulated, did not affect such transactions with any taint of illegality or fraud; that within the “Confederacy” it was the only circulating medium, and was generally received and passed as money, or token of value, by which values were to a great extent fixed, and debts generally paid and exchanges effected; that it had a value, though greatly varying in different localities and at different periods, as compared with silver and gold coin, which, for the time, were commodities for trade rather than money for circulation, and, therefore, neither executory nor executed contracts can be held illegal or void, because based upon it; and where of importance, in adjudicating such contracts, its value at the time and place where the contract was made should be shown, and that the effect of payments and investments in it by agents, representatives, and trustees must depend, in the main, upon the facts and circumstances of each particular transaction. (*Atkin v. Mooney*, Phil. (N. C.) Law, 31; *Robinson v. International Life Assurance Society*, 42 New York, 54; *Davis v. Mississippi Central Railroad Co.*, 46 Miss., 552; *Martin v. Horton*, 1 Bush., 629; *Rodes v. Patilla*, 5 Bush., 271; *Emmerson v. Mallit*, Phil. (N. C.) Eq., 234; *Walker v. Page*, 21 Gratt., 636; *Thorington v. Smith*, 8 Wall., 1; *Myers’s*

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Ex'rs, *v. Zittelle*, 21 Gratt., 733; *Hale v. Wall*, 22 Gratt., 424; *Green v. Seirzer*, 40 Miss., 500; *Planters' Bank v. Union Bank*, 16 Wall., 483; *Bond v. Perkins*, 4 Heisk., 564; *Westbrook v. Davis*, 48 Ga., 471; *Suber v. Kent*, 5 West Va., 96.)

It necessarily follows from the rulings in the cases just cited, now generally regarded as correct, that when a party, capable of contracting, has made a contract, which is free from all fraud or imposition, he will not be permitted to avoid it, whether it is executed or executory, on the ground that the consideration for it was Confederate money. But when a contract was made, or money collected by one who acts not for himself, but as the representative, agent, or trustee of another, the validity of the contract, or effect of the payment in discharge of the debt, depends upon the fact, whether the power, under which such party acts, authorized him to take Confederate money, or whether the circumstances surrounding the transaction, or the previous action of the principal, justifies the party dealing with him in concluding that the agent had authority to exercise his discretion in the premises.

As appellant brings this suit to recover upon the notes given Mason by appellee in part payment for the land, it must be inferred, whether it appears upon the face of the letter of attorney or not, that Mason was authorized to sell upon the terms he did, and to take the notes, payable to his own order, for the deferred payment. But, as it is inferable from the evidence that the equitable right to the notes was in appellant, and the proceeds from them, when collected, belonged to appellant, if the one here in controversy has not been satisfied and extinguished by appellee's alleged payment of it to Mason, as appellant's agent or as the legal holder and payee of it, the judgment against her should be reversed.

Appellant's right to a recovery in the case involves the determination of one or both of the following questions:

First: It being conceded that appellant was the equitable

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owner of the note, and entitled to the money for which it was given, and being a citizen of one of the States adhering to the Union at war with the Confederate States, did Mason have authority to collect or receive the money due upon it at the time it was paid?

Second: If Mason was authorized to collect the note, was he authorized to receive Confederate money in payment thereof, and would such payment relieve the maker from liability to the party to whom the note equitably belonged and for whom the payee held it merely in trust?

It cannot be questioned that it is a universally-recognized general rule of international law, that war suspends for the time all friendly intercourse between citizens of hostile States; that while it continues no kind of business or commercial intercourse can be legitimately transacted or carried on by citizens of the one with those of the other, unless specially authorized by government; and so general and pervading is this principle, that war is held to dissolve *ipso facto* commercial partnerships existing at the breaking out of hostilities between citizens of States at war with each other, and to revoke or supersede authority of agents in regard to transactions not agreed upon and in part executed, and especially such as confer authority to buy and sell property. But, nevertheless, it seems to be equally well settled that war does not revoke or suspend authority for the collection of a debt, given previously to the beginning of hostilities, by a citizen of one of the hostile States to an agent, who, as well as the debtor, resides in the other. (*Clarke v. Morey*, 10 Johns., 73; *Paul v. Christie*, 4 H. & McH., 161; *Denniston v. Imbrie*, 3 Wash. C. C., 396; *Mouseaux v. Urquhart*, 19 La., 485; *Griswold v. Waddington*, 15 Johns., 64; *Buchanan v. Curry*, 19 Id., 137; *Coon v. Penn*, 1 Pet., 496; *Ward v. Smith*, 7 Wall., 44; *Fisher v. Krutz*, 9 Kan., 501; *Grover v. Carter*, 3 Hawk., 328; and cases previously cited.)

What, then, was the effect of the payment of the note to Mason in Confederate money? The power to collect the

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note may be inferred from the authority to sell the land and take the note in payment for it; and as no instructions were given, requiring its payment exclusively in gold and silver coin, if it had been paid before the war between the States began, it cannot be denied that Mason would have been authorized to have received in payment of it current bank-bills, or other tokens generally taken and received in payment of debts and current in business transactions as money. (*United States Bank v. Bank of Georgia*, 10 Wheat., 347.) The creditor, of course, has the right to exact the payment of his debt in such money as the law declares to be a legal tender. Why, then, may the agent, who is authorized merely in general terms to collect, without anything being said as to the character of the money in which he is to do so, receive payment in that which is not a legal tender? Unquestionably, because, by the authority given the agent, without restriction as to the kind of money he shall receive, it must be inferred that the principal intended, and his agent, as well as the debtor, understood, that he was willing for his debt to be paid in such bank-bills, or other currency, as was generally taken and received by others in payment of debts. The legal inference from the authority given an agent to collect a debt is, that he is authorized to receive money, current and at par with coin, usually received in like transactions by the community in general where the debt is paid. The agent, therefore, has no authority to sell, or barter and exchange the note to the debtor, or any one else, for drafts, bills of exchange, or any kind of personal or real property. The inference to be deduced from the general authority given the agent to collect is, that he must do so in money. But in what kind of money shall this be done? Is it to be understood that, in such cases, the word "money" is to be taken in its most restricted and limited sense, and should be held to refer to such gold and silver coin, or notes and bills, as are, by the Constitution and laws, declared to be a legal tender; or is it to be taken and interpreted according to its popular use, and held to authorize the

receipt of currency and bills recognized in general circulation where the debt is to be paid, as money? We answer, in general, unless the language of the power is qualified or restricted, it should be held to import the latter. It therefore shows that such an agent is authorized by the power to receive whatever is generally recognized and treated in business transactions as money, and is at par, and readily convertible into money, made by law a legal tender, for the payment of debts, or where the discount upon it is so little as to have no material effect upon its general circulation and value.

Tested by these rules, we are of opinion that Confederate money, at the time and place of its payment to Mason, must be held to have been current tokens, or bills, used and passing in business transactions as money at their par value; and hence, it should ordinarily be inferred that an agent would have been authorized to receive them, unless forbidden to do so by his principal, or restrained by express or clearly implied limitation in the power under which he acts. (Story, Prom. Notes, sec. 500, *et seq.*; *Miller v. Race*, 1 Burr, 452; *Grant v. Vaughan*, 3 Id., 1516; *Gorger v. Mirville*, 3 B. & C., 45; *Mann v. Mann*, 1 John. Ch., 230; *Coleman v. Wingfield*, 4 Heisk., 133, and case previously cited.)

It is claimed, however, that the payment of this note in Confederate money is not to be regarded in the same light as if appellant had been a citizen of the Confederacy. It is argued, as appellant was a citizen of the State of New Jersey, where Confederate money would have been entirely worthless, and if not, as it would have been in violation of law for her to attempt to have made use of it, if it had been remitted to her, and as it cannot be supposed that she desired to lay up as an investment note put in circulation by, and having no security for their payment but the promise of an illegal and revolutionary government, as regarded by the loyal citizens of New Jersey, it is not to be supposed that appellant would have received such money in payment of the note, if it had been tendered directly to her. This interpretation of the

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power of collecting agents for non-residents of the Confederate States seems to have received the approval of the Supreme Court of the United States, (*Fritz v. Stone*, October Term, 1874,) and also of the Court of Appeals of Virginia, (*Alley v. Rogers*, 19 Gratt., 381.) In both of these cases, however, it appears that there had been considerable depreciation in the value of Confederate money before its payment to the agents. The authority of *Alley v. Rogers* seems also, to some extent, weakened by the case of *Pridgeon v. Williams*, 21 Gratt., 251, in which the collection of a judgment in favor of a non-resident, by his attorneys, in Confederate money, before it had depreciated but little in value, was held to be valid. It may be also noted that in *Fritz v. Stone*, it is said: "The authority to collect was based on the power to remit, and that, it was impracticable, as well as unlawful, to do." It is certainly not to be presumed that it is necessary or even usual for the agent to remit the identical money he receives to the foreign creditor. But he will almost invariably do this by bill of exchange, whether the debt has been collected in bank-bills or coin: and during the war it would have been just as illegal for the agent to have remitted gold as Confederate money. But had it been remitted, it is a conceded fact, that at the date of the payment to Mason, Confederate money was worth, in the city of New York, as much as the legal-tender notes of the United States, and was as little below par with gold as these notes have been from that day to this.

It is not necessary for us at present to determine whether the agent, under similar circumstances as in this case, would have had authority to receive Confederate money in satisfaction of a note payable to a resident of that part of the United States with which we were carrying on war. This note was payable to a citizen of this State. It is true, appellee knew that it was given for land which belonged to appellant; but he is not to be supposed to be cognizant of the object and purpose of appellant and her attorney in having the note made payable to the agent. Being payable to Mason, he did

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not need a power of attorney from appellant authorizing him to collect it. Unless appellee was notified, or had information from which he should have concluded that, though the note was payable to and in possession of Mason, its payment to him would operate as a fraud upon appellant, he certainly could make no opposition to Mason's collecting it in such manner as he thought fit. (*Murrell v. Jones*, 40 Miss., 565.)

It has been frequently held by this court that a debtor cannot resist a suit upon a note by the party in possession of it, with the apparent legal right, on the ground that he is not in fact the owner, but that in equity it belongs to some one else. (*Thompson v. Cartwright*, 1 Tex., 87; *De Cordova v. Atchison*, 13 Tex., 372; *Butler v. Robertson*, 11 Tex., 142; *Wimbish v. Holt*, 26 Tex., 672.)

Had the courts been open when appellee paid the note, Mason could have forced him to pay it; and surely it cannot be held that one may not voluntarily discharge a debt to a party to whom the law, if appealed to, would give a judgment. From the evidence, there seems no reason to doubt that appellee acted with good faith and entire fairness. This is not a case of an attempt to be relieved from a just debt by its payment in a depreciated and worthless currency, through the pressure of popular sentiment or military orders. It was made on the solicitation of the payee and holder of the note, at a time when Confederate money was eagerly sought for by almost every one, and when it could be readily invested in property on the same terms as gold and silver coin; and although appellant may have derived no benefit from it, to require appellee to pay the debt a second time, would be palpably unjust. If appellee has cause of complaint against any one, it is of her agent, and not appellee.

The judgment is affirmed.

AFFIRMED.

Argument for the appellant.

ROBERT MASTERSON V. ROBERT COHEN AND JOHN BRASHEAR.

1. TRESPASS TO TRY TITLE—PURCHASER—VENDOR AND VENDEE.—

A purchaser of land at a trust sale, made under a deed of trust, which was executed by one, the recorded deed to whom retained in terms a lien for the purchase-money notes, which were never paid, does not acquire such a right as will enable him to maintain trespass to try title against one, who is in possession for a valuable consideration, under the administrator of the original vendor.

2. APPROVED.—*Dunlap v. Wright*, 11 Tex., 603, approved.

3. VENDOR AND VENDEE—LAND.—When a deed is made reserving in terms a lien for the purchase-money, to be paid as specified, in notes given for the land, the vendor has the superior right to the land and to its possession, on default made by the vendee in payment of the notes.

4. LAND—PURCHASER—VENDOR AND VENDEE—SUBROGATION.—B sold land to C, reserving, in the deed made by him, a lien for the purchase-money, to be paid, as specified, in notes given therefor. The notes were never paid; B died, and C conveyed the land to K, who was B's administrator, receiving in payment his own notes, given to B, and making a deed to K: *Held*,

1. The conveyance from C to K, and the delivery to C of the notes for the purchase-money, conferred upon C no greater estate than he originally acquired by his deed, nor did it diminish the right of the estate, or of any one legally holding under it.

2. Though the notes were delivered up and canceled, the consideration of the deed to C, the payment of which could alone pass the legal title by virtue of said deed, was not, in fact, paid to the estate.

3. A sale under a deed of trust, executed by C, before his surrender of the notes, was not affected by said surrender, and the deed made by C to the administrator; but the purchaser at the trust sale, upon paying the original purchase-money due from C, would be entitled to recover the land.

5. Although the vendor's lien may be absolute, yet if a mortgage for the purchase-money be given back at the same time, the fee will substantially remain in the vendor.

APPEAL from Fort Bend. Tried below before the Hon. L. Lindsay. The opinion recites the facts.

John T. Harcourt, for appellant.—It is believed that the principles involved in this case are settled by the well-con-

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sidered opinion of Chief Justice Wheeler, in the case of *Buchanan v. Monroe*, 22 Tex., 537. According to that opinion, when applied to the facts of this case, we contend that the conveyance by the mortgagors, A. J. Hay and wife, transferred the equity of redemption to R. A. Smith. It passed the entire estate and interest in the property, subject to the lien, and became the estate of R. A. Smith, and so remained, up to the day of sale by the trustee, on the 2d day of June, 1868. In case a suit had been instituted by J. W. Brashear, in his lifetime, or by his administrator, John Brashear, to foreclose the vendor's lien, R. A. Smith would have been a necessary party, in order to bar his equity of redemption. (4 Kent's Com., 185; Story's Eq. Pl., secs. 193, 195, 197; *Hall v. Hall*, 11 Tex., 526.) But A. J. Hay and wife would not have been necessary parties, because they had parted with their entire estate and had no interest to be affected by the decree. Their equity of redemption was transferred and passed by the conveyance to R. A. Smith, who was thereby subrogated to their estate, and all their rights in relation thereto. His estate and rights after the conveyance was, in all respects, the same as those of Hay and wife before.

A decree of foreclosure, to which R. H. Smith was not a party, would not have barred his equity of redemption. He would not have been bound by the decree, much less would he be bound by any "voluntary foreclosure," or private arrangement between Hay and wife and John Brashear; and the title of a purchaser, at a sale under such decree, would have been inoperative to divest Smith's right, and ineffectual in an action to recover of him the possession. But the sale, made by the trustee in pursuance of the power in the mortgage, had the effect of a decree, to which he was a party, to foreclose and bar his equity of redemption, and vest the paramount title in the purchaser at the sale, viz, Robert Master-son, subject only to the payment of Hay's note to J. W. Brashear. (*Ligon v. Alexander*, 7 J. J. Marsh, 288.)

J. W. Henderson & Gustave Cook, for appellee.

ROBERTS, CHIEF JUSTICE.—This is an action of trespass to try title to certain lots in the city of Houston, brought by appellant, Masterson, against appellees, Cohen and Brashear, on the 1st of October, 1868, in the county of Harris, the venue in which was changed to Fort Bend county, where the judgment was rendered against the plaintiff, Masterson, that he take nothing by his suit, and pay the costs thereof.

Both parties set up title to the lots from a common source, to wit, from J. W. Brashear.

The chain of Cohen's title is as follows, to wit:

1. A deed from J. W. Brashear to A. J. Hay, on the 15th of December, 1858, acknowledged for record the same day, and recorded 27th June, 1860, which stipulated for "retaining a lien on said property for the payment of two notes given by said Hay, one for \$362.50, payable in six months, and the other for \$362.50, payable in twelve months, with interest at ten per cent. from date."

2. A deed from A. J. Hay to John Brashear, on the 22d of April, 1861, recorded, after acknowledgment, on the 7th of May, 1861, which recited a consideration of \$900, but it was proved on the trial that the consideration was the delivery to Hay of the two notes given by him for the lots by John Brashear, who, upon the death of his father, J. W. Brashear, in 1859, had become the administrator of his estate.

3. A deed from John Brashear to Robert Cohen, on the 9th day of May, 1861, recorded, after acknowledgment, on the 9th of May, 1861, which recited a consideration of \$850, and which was proved on the trial to have been fully paid by Cohen.

It was also proved that the lots remained vacant and unimproved until after they were purchased by Cohen, who then took possession and erected a dwelling-house and other improvements upon them, worth, at the trial, \$6,000 or \$8,000,

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and that the naked lots were then worth \$2,000 or \$2,500. It was also proved that Hay had never paid any of the purchase-money contracted to be given by him for the lots.

The chain of title of Masterson was as follows, to wit:

1. A deed of trust executed by A. J. Hay to W. P. Hamblin, on the 26th day of June, 1860, while he had the interest conveyed to him in the deed from J. W. Brashear, filed for record, after acknowledgment, on the 29th day of June, 1860, to secure the payment to R. A. Smith of two notes, due from Hay in twelve and eighteen months, amounting to \$2,500.

2. A deed from Hamblin, trustee, to Robert Masterson, upon a sale of the lots under the deed of trust, on the 2d day of June, 1868, for the consideration therein recited of \$600, which, though acknowledged for record on the 24th day of June, 1868, is not shown to have been recorded. It was proved that Hamblin, the trustee, before any improvements had been made on the lots, notified Cohen of the existence of the trust deed which he held in favor of Smith.

The question arising upon the state of facts here presented is, did Masterson acquire such a right to the lots by his purchase under the trust deed as would enable him to dispossess Cohen in this action of trespass to try title? We think he did not.

The determination of this case depends upon the express lien reserved in the deed from J. W. Brashear to A. J. Hay, by which said Brashear retained the superior right to the land.

In the case of *Dunlap v. Wright*, 11 Tex., 603, it was held, that "although the vendor's deed may be absolute, yet if a mortgage for the purchase-money be given back at the same time, the fee will substantially remain in the vendor." This rule has been repeatedly announced and acted on since that decision was made. (*Ballard v. Anderson*, 18 Tex., 377; *Baker v. Clepper*, 26 Tex., 634.) The same rule has been applied to the case of a deed reserving an express lien for the payment of the purchase-money, where the land was sold

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on a credit, and notes taken for its payment, in which it was held, that the vendor had the superior right to the land, and to the possession upon the default of the vendee in the payment of the notes given for the purchase-money. (*Baker v. Ramey*, 27 Tex., 52.) The deed from Hay to John Brashear, who was administrator of the estate of J. W. Brashear, and the delivery of the notes given for the purchase-money, being simultaneous acts, did not confer upon Hay any greater estate in the land than he had originally acquired by the deed to him, nor did it diminish the right of the estate of J. W. Brashear, nor the right of one legally holding under said estate. Cohen, at least, held possession of the land by permission, and under the authority of the administrator for a valuable consideration, under such a right and title as could, perhaps, only be called in question by the heirs or creditors of said estate, if it could be at all. Although the notes were given up and canceled, the consideration of the deed, the payment of which could alone pass the legal title to Hay, by virtue of said deed, was, in fact, not paid to the estate. On the other hand, Hay having executed the deed of trust to Hamblin, while he had a conditional estate in the land, whatever right was conveyed to Hamblin by the deed of trust for the benefit and security of Smith, was not defeated by the delivery of the notes to Hay upon his making a deed to the administrator, John Brashear. Had Hamblin, when the Smith debt became due, sold the lots under the deed of trust, the purchaser at said sale, upon paying the purchase-money, or tendering it, might have acquired the right to recover the lots. The effect of the long delay, and of the improvements made by Cohen upon the lots, may present equitable grounds for modifying any such recovery, which it is not necessary now to consider. The tender pleaded, or attempted to be pleaded, in the amended petition, was not a tender made in such way as to change the nature of the action of trespass to try title, as presented in the original petition. What we

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decide is, that plaintiff has shown no such right as entitles him to recover in such action.

The charge of the court, though not in terms, was, in effect, in accordance with the view of the law here presented, as applicable to the facts of the case. The rulings of the court, upon the exceptions to the pleas of defendants, have become immaterial, inasmuch as the plaintiff has failed to present such facts as entitle him to recover in the action brought by him.

There being no error of which plaintiff has any right to complain, the judgment is affirmed.

AFFIRMED.

CITY OF NAVASOTA v. BEN. W. PEARCE.

1. **DAMAGES—STREETS—MUNICIPAL CORPORATIONS.**—No action for damage can be maintained against a municipal corporation, such as a town or city, to which the “exclusive control and power over its streets, alleys, and public grounds and highways” is given by its charter, by a party who has suffered an injury occasioned through want of repair of its streets.
2. It is universally admitted that an individual action, unless authorized by statute, cannot be maintained against counties, parishes, or commissioners of highways, for damages sustained through their neglect to keep their bridges and highways in repair, although the duty of doing so is clearly enjoined upon them by law, and they have authority to collect taxes, and make adequate assessments to that end. The establishing and maintaining a highway is a matter of State duty, and whether its discharge is intrusted to the county, street commissioners, or a municipal corporation, by its charter, is immaterial; the right to recover damage for injury sustained by the neglect of duty by either, in keeping a highway in repair, does not exist.
3. But where the privileges given in a charter, are granted either upon an express or implied condition of corporate responsibility to individuals who suffer damage through the neglect of their performance of duty, or when the charter confers some franchise or privilege, from which profit may be made, apart from its governmental powers, and which might have been granted to a private corporation or an individual, an action may be maintained for damage sustained from

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a breach of such condition, or through the negligent or improper exercise of the rights conferred by such franchise.

4. SAME.—Plaintiff sued for damages, for the loss of his horse and injury to his buggy, occasioned by the negligence of the city of Navasota in keeping its streets in repair. The horse fell in harness, rolled into a ditch, was killed in the affair, and the buggy broken: *Held*, That no action lay against the city.
5. SAME.—There is no such liability by statute, and the decision is based upon the rule at common law.

APPEAL from Grimes. Tried below before the Hon. J. R. Burnett.

January 27, 1873, B. W. Pearce sued the city of Navasota for damage, alleging the failure of the authorities of the city to keep the streets, &c., in safe condition for traveling, and that, from such negligence, injury had been occasioned to plaintiff; in that, on October 29, 1872, while driving his horse and buggy in one of the public streets of said city, his horse slipped and fell, and, while scrambling, rolled into a ditch, receiving a wound from the shaft of his buggy, then broken, from which the horse died; that the buggy was greatly injured. Judgment was asked for the value of the horse and the damage to the buggy.

The defendant demurred, and plead a general denial, and that the accident and consequent injury to plaintiff, was occasioned by his own neglect, and want of skill in managing his horse, &c.

The jury returned a verdict for plaintiff for two hundred dollars damages. A motion for new trial was overruled, and the city appealed. The errors assigned, and the additional facts necessary, are given in the opinion.

J. R. Kennard, for appellant, cited *Detroit v. Blakely*, 21 Mich., 84; *Bartlett v. Crozier*, 17 Johns., 438; 2 Hill on Torts, 493, 502, 503, 507; *Morey v. Newfane*, 8 Barb., 645; *Hewiston v. City of New Haven*, 37 Conn., 475; *Sykes v. Town of Paulet*, 43 Vt., 446.

Boone & Goodrich, for appellee.

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MOORE, ASSOCIATE JUSTICE.—We are called upon in this case, for the first time, to determine, whether an action for damages can be maintained against a municipal corporation, such as a town and city, to which the “exclusive control and power over its streets, alleys, public grounds, and highways” is given, by charter, to a party who has suffered an injury occasioned through want of repair of its streets.

Numerous decisions from the courts of other States may be cited in which such actions have been incidentally or directly approved. A careful examination, it is believed, will show that the precise question which is here presented has been decided in by no means so many of them, however, as would be supposed, on a casual examination, leaving out of the account the decisions of those States where such actions are given by statute. But still it cannot be questioned that such actions have been often maintained, aside from statutory authority in their support, in courts of the highest authority, and by jurists of pre-eminent learning and ability; and we should be forced to admit that the great, if not overwhelming weight of authority, was unquestionably with the affirmative of the proposition, if the decisions in its favor were in harmony with each other. But they are in irreconcilable conflict, in respect to the grounds on which it is held the action arises and is to be maintained, where any effort is made to develop the principle of law upon which the right of action is founded, if it has any solid support beyond the general current of decisions in the courts of the New England States in its favor, and it is there held that such actions are not maintained by the common law. (*Mower v. Inhabitants of Leicester*, 9 Mass., 247; *Barney v. City of Lowell*, 98 Mass., 570; *Mitchell v. City of Rockland*, 52 Maine, 118.)

It is believed to be now admitted everywhere that an individual action, unless authorized by statute, cannot be maintained against counties, parishes, or commissioners of highways, and such *quasi* corporations, for damages sustained through their neglect to keep their bridges and highways in

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repair, although the duty of doing so is clearly enjoined upon them by law, and they have authority to collect taxes or make adequate assessments to this end. (*Bartlett v. Crozier*, 17 Johns., 439; *Freeholders of Sussex v. Strader*, 3 Harr., 108; *Weet v. Brockport*, 16 N. Y., 161, note.) We confess it does not surprise us, that it has been found somewhat difficult with those who acknowledge the correctness of these decisions, and yet maintain, when a like duty has been imposed upon a village, town, or city by its charter, that damages may be recovered of these corporations by an individual who has sustained an injury from neglect of the like duty, to agree upon the ground on which the action is to be maintained.

But let us consider the grounds upon which those who insist upon such corporate liability have sought to maintain it. The earliest cases to which reference is generally made in discussing the subject, are those of *Bailey v. Mayor, &c.*, 3 Hill, 531, and *Mayor v. Furze*, 3 Hill, 612, though neither of them present the precise question which is before us. In the first of these cases the court draws a distinction between powers conferred upon municipal or public bodies, exclusively for public purposes, and those where they have a private interest or estate for private advantage or emolument. No action, it is admitted, can be maintained against the corporation for an omission or breach of duty in respect to the former, while in respect to the latter the corporation stands on the same footing as an individual having like special franchises. The principle here announced seems to be in strict accord with the doctrine in the case of *The Mayor v. Turner*, 86 Cow., and *Henly v. The Mayor, &c.*, 5 Bing., 91. And if municipal corporations are invested by law with franchises and privileges from which they derive private advantages and emoluments, as is well known is often the case in England, we have no question, if an individual suffers injury from a breach of duty by the corporation in respect to these special franchises, that he is entitled to his action. It seems, however, impossible for us to say that incorporated towns and cities derive any pri-

vate advantage or emolument from the power to control and repair their streets and alleys.

In the case of *Mayor v. Furze*, an altogether different principle is announced. Park, Justice, in the case of *Lyme Regis*, when before the House of Lords, 1 Bing., 222, in speaking of corporations and individuals who hold franchises on conditions, says: "It is clear and undoubted law, that whenever an indictment will lie for non-repair, an action on the case will lie, at the suit of a party sustaining any peculiar damage." But so broad an application of this language of Mr. Justice Park, unquestionably, cannot be sustained, as was shown in subsequent cases in the same court, in which it is in effect repudiated. (*Wilson v. The Mayor, &c.*, 1 Denio, 601; see also *Weet v. Brockport*, 16 N. Y., 162.) If the principle announced in *The Mayor v. Furze* is correct, unquestionably an action might also be maintained against counties and parishes, though such an action, as is admitted in the case of *Russell v. The Men of Devon*, 2 Term, 673, had never been even brought prior to that time.

In the case of *Weet v. Brockport*, the court, after an elaborate and careful review of the previous decisions, and thorough discussion of the question, held, upon the authority of Lord Mansfield, in the case of *Whitfield v. Lord Le Despencer*, Cowp., 754, that "a public officer who receives no compensation from, and owes no duty to any private individual, is accountable to the public alone for his neglect." An analogous doctrine, it is also said, may be found asserted in Brooke's Abr., title, "ACTION IN THE CASE," upon the authority of the Year Books, that if a highway be out of repair, so that a horse be mired and injured, "no action lies by the owner against him who ought to repair it, for it is a public matter, and ought to be reformed by presentment." The court, in discussing the point, also quotes, with approval, the following observations of Judge Huger, in the case of *Young v. Commissioner of Roads*, 2 Nott & McCord, 537, who says: "When an officer has been appointed to act, not for the pub-

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lie in general, but for individuals in particular, and from each individual receives an equivalent for the services rendered him, he may be responsible in a private action for a neglect of duty; but where the officer acts for the public in general, the appropriate remedy for his neglect of duty is a public prosecution." He also quotes, with marked approval from the dissenting opinion of Judge Sandford, in the case of *Hutson v. The City of New York*, 5 Sandf., 289, stating, however, that so far as this point is concerned, all his associates concurred with him, as follows: "It seems to us, the true distinction is that we have mentioned. When the duty is to individuals specially, for a reward, originating from them, a civil action may be brought for neglect, whether of themselves or of their subordinates; but when it is a duty to the public generally, undertaken alike for all citizens, the remedy is by indictment only, together with removal from office, where prescribed by law." It seems clear, both from reason and authority, that the ground upon which such actions are held to lie, in the case of *The Mayor v. Furze*, is untenable, and they are maintainable alone on the principle at the basis of the cases of *Lyme Regis* and the *Mayor of Linn*, and the series of English cases upon the authority of which they were decided, viz., that where, for a consideration from the sovereign, a corporation or individual has become bound, either by expressed or implied covenant or agreement, to do certain things, such corporation or individual is liable, in case of neglect to perform such undertaking, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect.

From this conclusion, it is evident, that the action could not be maintained, unless it can be shown that the corporation held and enjoyed some franchises, right, or privilege, in consideration of having undertaken the duty of keeping its streets in repair. And such, it maintains, is the fact, as shown by the following considerations: The surrender by the Government, to a municipal corporation, of a portion of its

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sovereign power, if accepted, may, as such charters never are imposed upon them, except at their urgent request, with propriety, be considered, says the court, as affording ample consideration for an implied undertaking, on the part of the corporation, to perform, with fidelity, the duties which its charter imposes.

It cannot be controverted, and has probably never been denied, where the privileges given in the charter are granted either upon an express or implied condition of corporate responsibility to individuals, who suffer damage through the neglect of their performance of duty; or, when the charter confers some franchise or privilege, from which profits may be made, apart from its governmental powers, and which might have been granted to a private corporation, or an individual, just as well as to the municipality, an individual action may be maintained for damage, sustained from a breach of such condition, or through the negligent or improper exercise of the rights conferred by such franchise. This is merely a reiteration of the true principle, which, as the court had shown, was decided by the cases previously discussed.

It is, as is well known, by no means uncommon, in England, for municipal corporations, like towns and cities, or even *quasi* corporations, such as counties and parishes, to hold and exercise, by prescription and immemorial usage, or by special grant from the Crown, franchises and privileges, as private property, the grant of which, on the principle stated above, furnishes sufficient consideration to support actions, against such corporations, by individuals, injured by their neglect or omission to properly perform duties expressly or impliedly incumbent upon them by reason of the franchises or privileges thus exercised and enjoyed. But we cannot see that such cases furnish an analogy, which warrants its being held that a like liability attaches to municipal corporations, created, as is generally, if not universally, the case, with us, through motives of public policy, to which merely governmental powers are intrusted, in view of the general public welfare, as well as

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the better government of the districts which they embrace, but with no purpose of conferring private benefits upon the individuals composing them.

The ground upon which it is insisted, in the opinion in the case of *Weet v. Brockport*, and adopted in the subsequent case of *Hickok v. Plattsburgh*, 16 N. Y., 191, (note) as a correct exposition of the principles governing in actions of this character, is, that while such corporations may be governmental measures in theory, they are in fact privileges of great value, and because the franchises they confer are sought for with much earnestness, and are never imposed, it is said, upon municipal bodies, except at their request, and it is upon this ground the actions have been subsequently maintained in that State, and in the courts following its lead.

But, with due deference to the learned court from which this doctrine emanates, we are constrained to say, that it seems to us to be altogether fallacious. It had been previously demonstrated, in the opinion of the court, that such actions cannot be maintained against counties, parishes, or commissioners of highways, although like governmental powers are delegated to them by the State, within their respective jurisdictions, and notwithstanding the discharge of these duties are absolutely enjoined upon them, and although they are authorized to collect taxes, or make assessments, adequate to their proper discharge. Unquestionably, the powers intrusted to cities and towns, by their charters, are, in general, more important and far more varied than those usually delegated to counties and parishes; but, if they are limited merely to the delegation of governmental powers, they can be exercised only, so long as it is the pleasure of the State to permit it. The grant, and acceptance of such charters, do not have effect as contracts between the State and corporation.

From the great difficulty, if not absolute impossibility, for the enactment, by the Legislature, of all necessary legislative and police regulations for the efficient and proper govern-

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ment of towns and cities, in respect to the interest of citizens of the State at large, as well as of those residing within their limits, it has become a fundamental principle in our theory of government, to intrust probably the largest portion of the powers of the Government, to be exercised within their limits, to local control, under town and city charters. The necessity for this is no doubt felt more fully, as well as more speedily, by the inhabitants of a given locality than by other citizens; therefore, as a general thing, such charters are not granted, "except at their request." Still, we cannot perceive how the fact that the Legislature was moved, on the petition of a portion, or even the entire population of the particular locality, to grant a charter, enabling them to exercise such portion of the sovereign power of the State as it deemed fit to intrust to it, should change the legal effect of the charter, or the rights and liabilities of the corporation. But if towns and cities are liable to actions of this kind, because such corporations are not usually created by the legislature, except on the urgent request of their inhabitants, the same is equally true, generally, with us, in respect to counties. On principle, therefore, they should be held to a like liability. This, however, as has been said, is now universally denied.

So far as we have observed, there seems to have been no effort, on the part of the advocates of the rule of liability, to maintain the doctrine of contract, from which it is deduced by the courts of New York, in their latter decisions, but rather to sustain it, on the ground of public policy and its general recognition in previous decisions. (*Barnes v. District of Columbia*, 1 Otto, 540; Judge Cooley's dissenting opinion, in *Detroit v. Blakely*, 27 Mich., 84.) And Judge Dillon, while insisting that it has been quite uniformly held, that incorporated towns and cities, having control of their streets, are liable to private parties for injuries caused by defective streets, though conceding that there is no corresponding liability on the part of counties, and other *quasi* corporations charged with similar duties in regard to highways and bridges, admits

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that "the ground for the distinction which gives an action, if the injury happens within the limits of a municipality having control of the streets therein, and denies it, if it happens within the limits of a township or county having equal control over the highways, and adequate means of discharging its public duties in respect thereto, is not as satisfactory to the mind as could be desired." (2 *Municip. Corp.*, 905.) Again, he says: "And especially have the courts been much perplexed respecting the principle upon which to rest the distinction. (*Id.*, 875.)

The source, however, from which he seems to deduce the liability, is by a division of the corporate powers of these municipalities into two classes; the first including, as he terms them, private or corporate duties, and the second, such as are of a public character, in which they act as State agencies; and that, as regards acts of the first class, they are liable to like responsibility as attaches to individual or private corporations aggregate.

It would extend this opinion beyond reasonable length to discuss the distinction here suggested. It must suffice to say, if it exists in regard to any of the powers conferred upon such corporations, it cannot, as we think, be maintained that the powers conferred upon them, with reference to their streets, fall within the first class. Certainly the establishing and maintaining of highways is a matter of State duty; and whether the discharge of this duty is entrusted to the county, street commissioners, or a municipal corporation by its charter, seems to us immaterial, and can in no way alter or change its character.

Not being able to perceive that the grounds upon which these actions have been upheld in the decisions in their favor, and not believing we are authorized to give sanction to them on the presumption of supposed public policy, we are constrained, notwithstanding the great weight of authority in their favor, to hold that they are unauthorized.

Whenever public or private interest demands that such

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municipal corporations shall be held responsible to injured parties, this privilege will be given by the Legislature. Until this is done, we are content to leave the matter as, in our opinion, it has stood under the common law, from time immemorial.

In differing, as we do, from the learned and distinguished courts, and eminent jurists by whom actions of this kind have been sanctioned and upheld, we are glad to know that we do not stand alone. (*Detroit v. Blackely*, 21 Mich., 84, and the cases there cited.)

In conclusion, we will add, that this opinion has no reference to any other character of case than the precise one before us; and we do not undertake to determine whether there may, or may not, be other cases in which an individual action may be maintained for wrongs done or damages sustained through wrongful act, or from the omission or neglect of municipal duty by corporations.

It appearing from the appellee's petition, that the acts of which he complains afford him no ground of action against appellant, the judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

SARAH J. PRICE V. HOUSTON DIRECT NAVIGATION CO.

1. DAMAGES—SUIT BY WIDOW FOR INJURY TO HER HUSBAND.—The act of February 2, 1860, (Paschal's Dig. 15, 16,) authorizing the heirs, &c., to bring suit where the injured party could, himself, have maintained an action for injury occasioned by the negligent, culpable or wrongful act of another, was not repealed by sec. 30 of art. 12 of the Constitution of 1869.
2. CASE APPROVED.—*H. & T. Central R. R. Co. v. Bradley*, 45 Tex., 171.
3. MASTER'S LIABILITY TO SERVANT FOR INJURY BY FELLOW-SERVANT.—The master is not liable for injuries sustained by his servant through the negligence or default of a fellow-servant.

Argument for the appellant.

APPEAL from Harris. Tried below before the Hon. James Masterson.

The steamboat Henry A. Jones, owned by the defendant, (a corporation, created by the laws of Texas,) loaded at Houston on the 13th February, 1873. The load was chiefly cotton, in bales, and whilst in Galveston Bay, from some reason, fire was communicated to the cotton, or to the vessel. The fire was first discovered about five o'clock in the morning. When first seen, it seems to have been well under way.

Of a crew of fifty-six persons, twenty-three were lost; and among the lost was John J. Price, husband of Sarah E. Price, the plaintiff, who sued for damages resulting from the death of her husband. She alleged various omissions of duty on the part of those in charge of the steamboat at the time of the disaster, as well as various deficiencies in the outfit of the boat, and the want of full complement of skilled officers in charge and in command of the boat at the time of the disaster. She claimed, that by reason of the wilful acts and omissions of defendant's servants, (which were set out,) her husband, who was, at the time, a clerk on said boat, in the employ of said company, lost his life, whereby an action for damages had accrued to her as surviving widow.

The defendant pleaded the general denial.

The jury found a verdict for the defendant, and the plaintiff appealed. From the grounds of the opinion, no further statement of the case is necessary.

Wheeler & Rhodes, for appellant.—As a true statement of the rules of law applicable to this case and the law which ought to have been given in charge to the jury, we rely confidently upon the opinion, delivered by Judge Robertson, of the Supreme Court of Kentucky, in the case of *L. & N. R. Co. v. Collins*, 2 Duvall, 114; we refer also to *Identity of Corporations and Agents*, 2 Duvall, 116; 8 Allen, 447; 57 Me., 202; *Goddard v. Grand Trunk Railway Company*, 2 Am. Reps., 495-500; 47 Mo., 567; *Harper v. St. Louis R.*

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R. Co., 4 Am. Reps., 358; 2 Redfield on Railways, 231, 515; 14 How., 87, 96, 483; The Philadelphia Railway Co. v. Derby, 27 How., 209, 210; 4 Head., (Tenn.) 642; Rex v. Medley, 25 Eng. C. L. Reps., 441; 34 Barb. N. Y., 274; 5 Ind., 201, 202, 340, 345.

No brief for appellee has reached the reporters.

MOORE, ASSOCIATE JUSTICE.—The act of February 2, 1860, authorizing the heirs, legal representatives, or relations of deceased persons to sue for and recover damages where the death of such persons has been caused or occasioned by the negligent, culpable, or wrongful act of another, as was decided by the majority of the court at its last session at this place, in the case of the Houston and Texas Central R. W. Co. v. Bradley, guardian, is in force and unrepealed by section 30, article 12, of the Constitution of 1869. Appellant's right to maintain the action must, therefore, be conceded, if an action could have been maintained against appellee by her husband, for the alleged negligent, culpable, or wrongful acts charged to have occasioned his death, if death had not ensued. To determine whether an action could have been maintained by appellant's husband, John J. Price, if death had not ensued from the alleged unfitness, gross negligence, or carelessness of appellee's servants and agents, it is necessary for us to determine the general proposition, whether the master is liable for injuries sustained by his servant through the wrongful act, negligence, or default of a fellow servant.

Although the question has not been heretofore authoritatively ruled upon by this court, still it has been so thoroughly discussed and repeatedly decided by the courts of Great Britain, Ireland, and almost every State of America, with the same result, that it can hardly now be regarded as presenting an open question. It would be an idle consumption of time for us to enter into an elaborate consideration of the question, or undertake to vindicate the conclusions reached

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in the courts in which it has been discussed with such remarkable unanimity of conclusion. If we were to attempt to do so, we would be forced to journey along a plain, familiar, and well-traveled road, and could only hope to entertain those who might accompany us with the reiteration of legal principles, arguments, and illustrations often presented by others with much more force and clearness than we could hope to do. We will, therefore, content ourselves with the citation of the authorities, in which the principle of non-liability of the master for damages, on account of injuries sustained by the negligence of a fellow servant, has been directly decided or clearly recognized. For which, in the main, we are indebted to the research and erudition of counsel in the different cases pending before us, involving this point. (*Hutchinson v. Railway Co.*, 5 Exch., 343; *Priestley v. Fowler*, 3 Mees. & Wel., 1; *Barton's Hill Coal Co. v. Reed*, 3 Macy T. & S., 266; *Brown v. Cotton Co.*, 3 H. & N., 511; *Walker v. Bolling*, 22 Ala., 294; *Cook v. Parham*, 24 Ala., 21; *Mobile and O. R. R. v. Thomas* 42 Ala., 672; *Hollower v. Henley*, 6 Cal., 209; *Yeomans v. C. C. S. Nav. Co.*, 44 Cal., 71; *Burke v. Norwich and W. R. R.*, 34 Conn., 474; *Ill. Cent. R. R. Co. v. Cox*, 21 Ill., 20; *Chicago & A. R. R. Co. v. Murphy*, 53 Ill., 336; 15 Ill., 550; 37 Ill., 108; *Madison & Ind. R. R. Co. v. Bacon*, 6 Port. (Ind.), 205; *Ind. R. R. Co. v. Love*, 10 Ind., 554; *Ohio & Miss. R. R. Co. v. Tindall*, 13 Ind., 367; *Ohio & Miss. R. R. Co. v. Hammersley*, 18 Ind., 376; *Wilson v. Madison & C. R. R. Co.*, 28 Ind., 371; *Col. & Ind. R. R. Co. v. Arnold*, 31 Ind., 174; *Pittsburg R. R. Co. v. Ruby*, 38 Ind., 294; 47 Ind., 499; *Sullivan v. Miss. & C. R. R. Co.*, 11 Iowa, 421; 32 Iowa, 357; *Union Pacific R. R. Co. v. Young*, 8 Kan., 658; *Hubgh v. N. O. R. W. Co.*, 6 La. Ann., 495; *Farwell v. Boston & Worcester R. R. Co.*, 4 Met., 49; 3 Cush., 276; *Gillshannon v. Stony Brook R. W. Co.*, 10 Cush., 228; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233; 11 Allen, 419; *Coombs v. New Bedford*, 102 Mass., 572; 110 Mass., 23; *Lawler v. Androscog-*

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gin R. R. Co., 62 Me., 463; *Bryan v. Cumberland Valley R. R. Co.*, 11 Harr., 384; *Wonder v. B. & O. R. R. Co.*, 32 Md., 411; 20 Md., 212; *Michigan R. R. Co. v. Leahey*, 10 Mich., 193; *Davis v. Detroit R. R. Co.*, 20 Mich., 105; *New Orleans and G. N. R. R. v. Harrison*, 48 Miss., 112; *McMahon v. Davidson*, 12 Minn., 357; *Harper v. I. and St. L. R. R. Co.*, 47 Mo., 567; *Devitt v. Pacific R. R. Co.*, 50 Mo., 302; *Brothers v. Carter*, 52 Mo., 372; *Fifield v. R. R. Co.* 42 N. H., 240; 31 N. J., 293; 34 N. J., 151; *Russell v. Hudson River R. R. Co.*, 17 N. Y., 134; 18 N. Y., (4 Smith,) 432; *Sherman v. Rochester R. R. Co.*, 17 N. Y., 153; 39 N. Y., 468; *Laning v. New York Central R. R. Co.*, 49 N. Y., 528; 53 N. Y., 449; *Ponton v. Wilmington R. R. Co.*, 6 Jones, (N. C.) 245; *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St., 384; *Frazier v. Penn. R. R. Co.*, 38 Penn., St., 104; *Caldwell v. Brown*, 53 Penn. St., 453; *Weger v. Penn. R. R. Co.*, 55 Penn. St., 460; 59 Penn. St., 239; 61 Penn. St., 58; *Ardes County Coal Oil Co. v. Gilson*, 63 Penn. St., 150; *Murray v. South Carolina R. R. Co.*, 1 McMullan, 385; *Fox v. Sanford*, 4 Sneed, 364; *Noyes v. Smith*, 28 Vt., 59; *Hard v. Vermont R. R. Co.*, 32 Vt., 473; *Hawley v. Baltimore & Ohio R. R. Co.*, 6 Am. Law Reg., 352; *Chamberlain v. Milwaukee R. R. Co.*, 7 Wis., 425; *Moseley v. Chamberlain*, 18 Wis., 700; 30 Wis., 674.)

To rebut this overwhelming array of authority, we are referred by counsel on the opposite side of the question, and there has otherwise come to our notice, only the decisions of the Supreme Court of the States of Kentucky and Ohio, and an opinion of Lord Cockburn, as regards the law of Scotland on the subject. But these decisions, we think, cannot be justly regarded as of any great weight. The leading case on the subject, in Kentucky, is that of *The Louisville and Nashville R. R. Co. v. Collins*, 2 Duval, 114. The subsequent decisions (4 Bush, 507, and 6 Bush, 579) merely follow it. It cannot be questioned, that in this case Judge Robertson defends the propositions, upon which he insists with his usual vigor of

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thought and acute and discriminating powers of reason. But the learned judge cites, throughout the opinion, not a single authority in its support. It can only be regarded, therefore, as entitled to such weight as its inherent force, and the approval of the learned court from which it emanates, gives it. The earliest of the cases cited from Ohio, (*Little Miami R. Co. v. Stevens*, 20 Ohio, O. S., 415,) to which the subsequent cases of *C. C. and C. R. R. Co. v. Keary*, 3 Ohio, 201, and *P. Ft. W. and C. R. W. Co. v. Devinney*, 17 Id., 197, certainly give no additional strength, was decided by a divided court. Only two of the four judges upon the bench concurred in the decision upon the point to which it is here cited. And the opinion of Lord Cockburn seems also to have been overruled, or, at least, not to have met with subsequent approval, in the House of Lords. (3 Macq., 206.)

There being no error in the judgment, it is affirmed.

AFFIRMED.

A. W. ROBINSON v. H. AND T. CENTRAL RAILWAY CO.

1. **CHARGE OF COURT, LOSS OF.**—In the absence of the charge of the court in the record, from its loss or otherwise, it will be presumed that the law applicable to the case was correctly given, and that the verdict was in accordance with the law as charged.
2. **FACT CASE.**—See facts held insufficient to support an action for damages against a railway company, from the negligence of one of its employes, in an action brought by another of its employes.
3. **NEGLIGENCE.**—An employe of a railroad company, knowing of a change in the arrangement for running the train, and not objecting to it, and where such arrangement is made by the consent and for the convenience of the employes, cannot complain of the increased risk occasioned by such arrangement.
4. **NEGLIGENCE OF FELLOW-SERVANT.**—A servant cannot recover damages from the master, for an injury sustained by reason of the negligence of a fellow-servant.
5. **SAME.**—The negligence of a servant of a railway company of one grade is as much one of the risks of the business as that of another;

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and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants, and not those of another class.

APPEAL from Harris. Tried below before the Hon. James Masterson.

February 15, 1873, Robinson sued the railway company for damages, for an injury to his foot, caused by the wheel of one of the cars of the defendant running over it, while he was acting as brakeman, in employ of defendant, on a freight train.

The defendant pleaded a general denial, and contributory negligence on the part of plaintiff.

On the trial, the plaintiff testified as follows; "At the time I got my foot hurt, I was in employ of the defendant as brakeman on freight train of defendant, running from Houston to Hearne. I have been so employed since some time in December next before. P. T. Atkinson was the regular conductor on the train, but on the 16th of February, 1872, he remained at Houston, and Wade H. Robinson acted as conductor on that trip. He was also a brakeman on the train with me. We left Houston about 4½ o'clock in the morning, and there were about twenty to twenty-five cars in the train. For trains of this length, the usual number of men was, one engineer, a fireman, conductor, and four brakemen. On this trip there was no brakeman to take the place of Wade H. Robertson; he acted both as brakeman and conductor. We were going north, and my station was on the rear car of the train, the caboose, and Robertson was stationed ahead of me several cars. As we approached Navasota, he called me to him, and said he was a little behind time; had a car to set out at Navasota, and wanted to lose as little time as possible, so as to meet the down train at Millican on time. He told me he would put on the brakes in front, so as to take up the slack of the train, and for me to go down between two cars and uncouple them. There were no hand holes or brake rods between the two cars that I was to go down be-

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tween. I went down and pulled the pin, and then the train separated. It was then running at the rate of five or six miles an hour. When the cars separated, I had nothing to hold on to, and I jumped out to one side. In doing this, I stumbled and fell. There was no brakeman at the rear end of the train. Wade H. Robertson motioned to me to get on the rear part of the train that had been cut off, and stop it. I understood his motion, or what he meant, and there being no side ladder on the first car, I ran back to the side ladder on the second car, and caught hold of it, and tried to spring up, but the construction train had dumped some fresh sand along there, near the track, and it, being soft, gave way under me, so that I could not spring so as to get a foot-hold. I saw that if I hung on to the train, I would be taken between the car and platform, and crushed, so I tried to throw myself away from the car with my hands and body, and, as I let go, I fell with my right leg across the rail and under the car, and, as I got it out, the car wheel caught and crushed my big toe and the one next to it. I got up and sat down on a pile of lumber. After setting out the car, the men on the train came back to me, and cut off my boot and took me to the depot station. This occurred between 11 and 12 o'clock, of the 16th of February, 1872, at Navasota. I never had known Wade H. Robertson to act as conductor of a train before, nor have I known of it since. He failed to put on the brakes so as to keep the cars from separating. I would not have gone down to cut the train, but for his promise to put on the brakes, and hold up the cars, and not let them separate. When they separated, I had nothing to hold upon, and nothing to stand on, except the draw-head, or bumper, and had to jump, or fall under the train. It was necessary for me to remount the part of the train cut off, and stop it. We usually work by signs, as the cars make so much noise, we cannot converse. I was laid up about six weeks with my foot, then went on crutches awhile, and it was about four months, from the time I was hurt, before I was able to work much.

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I am not more than half the man I was before; I can't get around so well; and can't run as fast as a setting hen. Very often I can't wear a shoe on that foot. Since I got able to work, I have been doing first one thing and then another. I first tried working in the Eagle Iron Works, but had to quit, because I could not stand the lifting, and it caused me great pain. I was getting fifty-five dollars a month on the railroad, and while disabled, it paid twenty-three dollars a month board. I am now engaged in buying hides and wool, in Galveston. Drs. Massie and Poulson attended me, and made three amputations of my two toes before the wound got well. Gangrene at one time set in, and made my wound very troublesome.

On cross-examination, he said: "I am now buying hides and wool for T. P. Robinson, of Galveston, and am getting sixty dollars a month; next winter I expect to get one hundred and twenty-five a month. I knew, the night before we left Houston, that Atkinson, the regular conductor, was not going on the train next day, and that Wade H. Robertson was to act as conductor in his place. I had heard that Robertson had been a conductor, but did not have any knowledge of the fact. I did not know whether any one was going in Robertson's place as brakeman or not. It is usual, when one man wants to lay off for a trip, for some other one to do the work of himself and the one that lays over, so as to keep his wages going on. It is usual for hands to jump on and off the cars when in motion. A man cannot stand on the drawhead of a car, when in motion, without something to hold to—a hand-hold or brake-beam at the end of the car. I knew the risk, when down between the cars, to cut the train, and would not have gone down but for the promise of Robertson, that he would put on the brakes and hold the train together. I don't know why the sand had been placed along the side of the track, but supposed it was to be used in raising the track."

Re-examined for himself, he said: "The sand along the

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track, where the accident occurred, had been dumped off by the car load, and, I suppose, was from one to two feet deep, for fifty or sixty yards before getting to Navasota station. Wade H. Robertson is now at work for defendant, as brakeman. He has been gone for a time. He worked three or four weeks for defendant, after I got hurt, so he told me. I had not seen him since, until yesterday."

James Terry, next sworn, says: "There is a space, of sixteen to eighteen inches, between box-cars, but not room for a man to stand on the draw-head, or bumper, while the cars are in motion, and after they have separated, without a brake-beam or hand-hold to cling to, unless he is tall enough to reach the top of the car. A competent conductor would not order a man down to cut the train while in motion, at the rate of five or six miles an hour, and when he had no brake-beams or hand-holds. I have done it myself, when I would not require another to do it, because I would sometimes take risks which I would not require others to take. When I did it, I could reach and hold to the top of the car. When brakemen know that a train is to be cut in this way, they usually provide a rope, with which to draw the pin to the top of the car."

A. W. Spencer, next sworn, says: I had been running trains on the Central Railroad about nine years, until I quit, about a year ago. The conductor has charge of the train, and the brakemen are required to obey him. He employs the train hands, and discharges them, when they do not suit him. No ordinary man could stand between two box cars, when in motion, and, after the train had separated, without hand-hold or brake-beam, to hold to. If the cars separate while he is between them, he must get out the best way he can. A competent conductor would not order a man down between two box cars to cut the train when in motion, and with nothing to hold to, and allow the train to separate while he was there. Train hands often catch the ladder on the side of the cars, and get on the train. Sand placed on the

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side of the track, I should think, would obstruct them some in doing so.

William B. Freer, being sworn, for defendant, testified: I was engineer on the freight train on which the plaintiff was, at the time he got hurt. It was at Navasota; the speed had been checked, and the train was moving, at the time, at the rate of four to five miles an hour. It went to the north end of the switch, and set out a car, and returned. When I saw the plaintiff was hurt, I went to him, and asked if he was hurt. He said he was trying to get on the train that had been cut off, and missed his hold, and the car ran over his foot. We cut off his boot, saw his toes were smashed, and took him to the station house, and a doctor was sent for, and soon after, the train went on to Millican. The steam shovel had dumped sand along the side of the track there, for purpose of raising the road—it had been dumped off in the usual way. Sand is often so placed along the track for repairing; it was lying along about the end of the ties.

On cross-examination, he said: I had not noticed the sand there before. It was fresh, and was some fifteen yards from the platform, and some twenty feet from the small one. There was about the usual number of cars on that train that day—say, twenty to twenty-five. When the train was cut, some five or six cars were left behind. There is sand along the track for repairs, and it sometimes remains a month before it is used.

J. A. Nelson, for defendant: I was brakeman on the train with plaintiff, and was on the train when he got hurt, but did not see the accident. My station was on a car nearest the engine; plaintiff was at the rear of the train. Ridgley and Wade H. Robertson were the other brakemen between us, the latter acting also as conductor on that trip. The night before we left Houston, I knew that Atkinson, the regular conductor, would not go on the train next day, and also knew that Wade H. Robertson would act as conductor

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on the trip. He did act as conductor and brakeman on that trip. I had never seen him act as conductor before, nor since, but had seen his recommendation as such from some other road. The train that day was about the usual length, say, twenty to twenty-five cars. It is usual to have a brakeman on the rear end of the train, in going into stations, in shifting, and in uncoupling. As we were going into Navasota that day, I saw the plaintiff and Wade H. Robertson standing at the place at which the train was cut. The brakes were at the opposite ends of the cars from where they were standing. I saw the plaintiff go down, after which he was out of my sight; the train was separated, and I could not see what had happened to plaintiff; but I saw Wade H. Robertson jump off the forward division, and get on the portion cut off, and stop it. We then set out the car, to be left at Navasota, and backed down the cars, cut off, when I found the plaintiff was injured. We took him to the station, and a doctor was sent for, but I don't remember who sent. I have seen Wade H. Robertson drink several times; never saw him drunk but once, and that was after the plaintiff got hurt. On that day I know he was as sober as I was, and I never drank a drop in my life.

On cross-examination, he said: T. P. Atkinson was the regular conductor of that train; there was no one on the train that day to take the place of Wade H. Robertson. He acted both as brakeman and conductor. Don't think I ever before saw a train cut in two while in motion, without a brakeman on the rear end of the train; and don't think I ever saw before, a man go down to cut a train, while in motion, without brake-rods or hand-holds; and never saw a train cut while in motion, and separate, with a man between the parts, either before or since that time. Wade H. Robertson did not give any signal to put on brakes, that I saw, when the plaintiff went down to cut the train, nor did I see any signal given to go ahead. I did not set any brakes, nor did I see any one else set any, until we stopped at the north

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end of the switch. I am now conductor of freight train for defendant. At the place where plaintiff was hurt, some fresh sand had been dumped on the side of the road, along about the end of the ties. I suppose it came within two or three feet of the rail, and, being soft, would impede one some in getting on the car. The momentum of the cars cut off, I would think, would have taken them past the station, and by the north end of the switch, if they had not been stopped.

W. H. Vaughan, for defendant: I am in employ of defendant, as assistant superintendent of freight, and have been so employed over two years. I have been railroading about fourteen years. The evening before the day on which plaintiff was injured, Mr. Atkinson, the regular conductor of the train, wished permission to lay over the next trip, and recommended Wade H. Robertson, one of his brakemen, to act as conductor of his train that trip. Atkinson is a good conductor. I did not know anything of Robertson as a conductor, and never saw any letter of recommendation of him as such; but Atkinson having recommended him, I gave him permission to lay over the next trip, and put Wade H. Robertson in charge of the train for that trip. Robertson is now a brakeman on the northern division of defendant's road.

Wade H. Robertson, for defendant: I was brakeman on the train on which the plaintiff got hurt, and on that day was also acting as conductor, Mr. Atkinson, the regular conductor, having remained over at Houston. I was conductor on freight train on the Pacific railroad, in Missouri, and brought letters of recommendation as such to this State from Mr. Redmond, the assistant superintendent of that road. I have also served as brakeman and as baggage master on that road. Before we got to Navasota, I told plaintiff we were a little behind time, and had a car to set out at Navasota, and I wanted to get to Millican on time, and I wanted him to go down and cut the train, and I would set the brake and hold up the train. He went down, and I set my brake, and did not give any signal to go ahead. He pulled the pin, and the

Argument for the appellee.

cars separated, and when he jumped off I halloed, and motioned to him to get on the rear train and stop it. I saw him fail to get on, and I then jumped off and got on it and stopped it. The train was moving at the rate of five or six miles an hour. Had seen cars uncoupled in that way before, but never knew them to separate. Can't tell what caused the separation.

On cross-examination, he said: The train was moving at the rate of five or six miles an hour. There was no brakeman on the rear end of the train after plaintiff went down to cut the train. If one had been on the rear end when the train was cut, he could have stopped it, and it would not have been necessary for the man, after cutting the train, to remount it. I ordered plaintiff to go down and cut the train, and told him I would hold the train together while he did so. I put on one brake. In answer to plaintiff's question, how he (witness) expected the plaintiff to get out, if the cars separated, witness said: I expected him to get out the best way he could. I never saw a train separate in that way before or since, and don't know what caused it. I had not acted as conductor on this road before that time, nor have I since, and did not receive conductor's pay for that trip. There was no one on the train to fill my place as brakeman.

There was a verdict for defendant, and plaintiff appealed. The charge of the court is not in the record.

Winch & Schaefer, for appellant, cited, *Fifield v. N. R. R.*, 42 N. H., 240; *Shearm. & Red.*, on Neg., 90, 91; *C. & N. R. Co. v. Sweet*, 45 Ill., 197; *C. & N. R. Co. v. Jackson*, 55 Ill., 492; *Harper v. I. & S. L. R. R. Co.*, 47 Mo., 567; *Rohback v. P. R. R. Co.* 43 Mo., 187; *McDematt v. P. R. R. Co.*, 30 Mo., 115; *Gibson v. P. R. R. Co.*, 46 Mo., 163; *Moss v. P. R. R. Co.*, 49 Mo., 167; *L. M. R. Co. v. Stevens*, 20 Ohio, (O.S.) 424; *C. C. & C. R. R., Co. v. Keary*, 3 Ohio, 201; *Laler v. C. B. & Q. R. R. Co.*, 56 Ill., 401.

Baker & Botts, for appellee.

Opinion of the court.

MOORE, ASSOCIATE JUSTICE.—This suit was brought by appellant, to recover damages for an injury sustained by him while acting as brakeman on appellee's train.

The charge of the court below is not in the record, and having been lost, cannot, it is said, be supplied. In the absence of anything to raise or justify a contrary inference, it must be presumed that the law applicable to the facts of the case was correctly given to the jury, and that their verdict was in accordance with the law as charged. It might, consequently, be well held, as appellee's counsel urges, that this presumption would justify, if it does not require, the affirmance of the judgment. Aside from this presumption in support of the judgment, we see nothing in the record to induce the conclusion that the verdict was not fully supported by the evidence, or that any error occurred in the trial of the case of which appellant has any just cause of complaint. If the injury he sustained was, in fact, occasioned by the fresh sand placed along the side of the track, there is no evidence tending to show that it was placed there by appellee, or by its officers having the general charge and management of its affairs, and whose acts are to be looked upon and regarded as the acts of appellee. If the sand was placed along the track by a mere fellow-servant, in the employ of appellee, appellant has no just cause of complaint. If its deposit along the side of the track was improper, unless it was done by the immediate or direct order of appellee, or had been improperly suffered by appellee to remain after having been notified of its being there, or after, by the exercise of reasonable diligence, it should have been known, it can only be regarded as the act of a fellow-servant, for which no action can be maintained by appellant against the company.

These remarks are equally applicable to the right insisted on by appellant, to recover, because one of the brakemen was put in charge of the train as conductor, and that too without an additional brakeman being put in his place. To this assumption it may be answered, that it was not shown that

the party put in charge of the train was not a fit and competent person to be entrusted with the discharge of the duties committed to him. The evidence, aside from the management of the train while acting as conductor on this occasion, seems reasonably sufficient to warrant the belief that he was fully competent and qualified to discharge the duties of conductor of the train for the trip. But if he was not, appellant was fully cognizant of the arrangement, and made no objection whatever to it. (*Skip v. Eastern Counties R. R. Co.*, 9 Exch., 223; *S. C.*, 24 Law and Eq., 396; *Williams v. Clough*, 3 H. and N., 260; *Mad Run v. Barber*, 5 Ohio St., 562.)

Such arrangements seem not to have been unusual with the train hands, and to have been for their mutual accommodation and advantage, and with their general concurrence and assent.

It is urged that the general rule which holds that a servant cannot recover damages from the master for an injury sustained by reason of the negligence of a fellow-servant, is not applicable in this case, because the injury to appellant resulted from the negligence of the conductor, for the time being, to whose direction and control appellant was subjected. For a time, as says Judge Cooley, (*Southern Law Review*, April, 1876, p. 110,) a strong disposition was manifested in some of the courts to hold to this view. We, however, agree with him, "that the negligence of a servant of one grade is as much one of the risks of the business, as the negligence of another; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omission on the part of one class of servants and not those of another class."

This, it is believed, is now recognized as the sounder and best-approved rule, both on reason and authority. (*Priestly v. Fowler*, 3 Mees. & W., 1; *Coon v. S. & U. R. R.*, 5 N. Y., 492; *Warner v. Erie R. R. Co.*, 39 N. Y., 468; *Columbus v. Arnold*, 31 Ind., 174; *Chicago v. Murphy*, 53 Ill., 336; 6 Cush., 75; 32 Vt., 473; 20 Md., 212; 23 Penn., 384.)

Statement of the case.

There is no error in the judgment, and it is therefore affirmed.

AFFIRMED.

W. J. HUTCHINS v. MASTERSON & STREET, ASSIGNEES, &c.

1. CHARGE.—A charge given upon a hypothesis not warranted by the testimony, is error,
2. FIXTURES.—The criterion for determining whether a chattel has become an immovable fixture, consists in the united application of the following tests:
 1. Has there been a real or constructive annexation of the article in question, to the realty?
 2. Was there a fitness or adaptation of such article to the use or purposes of the realty with which it is connected?
 3. Was it the intention of the party making the annexation, that the chattel should become a permanent accession to the freehold?—this intention being inferable from the nature of the article, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation and purpose or use for which the annexation is made.
3. SAME.—Of these three tests, prominence is given to the question of intention to make the article a permanent accession to the freehold, while the others are chiefly of value as evidence regarding this intention.
4. SAME—SUGAR-MILL.—A sugar-mill erected by the owner of a plantation, and sold as part of it, as to the rights of vendees, is a fixture, and part of the realty.
5. SAME—STATUTE OF FRAUDS.—A parol sale of a fixture by the owner of the land, would be void under the statute of frauds.

APPEAL from Brazoria. Tried below before the Hon. A. S. Lathrop, special judge.

January 8, 1872, D. G. Mills brought suit against W. J. Hutchins, for the recovery of a sugar-mill, alleged to be of the value of \$3,000, or its value, damages, &c. Mills going into bankruptcy, his assignees, Masterson & Street, were made parties. Plaintiff claimed title to the mill, by purchase of one Brown, who bought from McNeel, who bought of Asa Watt Thompson, on the — day of September, 1867.

Argument for the appellant.

The defendant pleaded the general denial; and that the mill was a fixture on a plantation which had been conveyed by Mrs. Nancy Thompson to her sons, A. Watt Thompson and Wells Thompson, in which A. Watt Thompson had conveyed his interest, November 26, 1866, to Wells Thompson, and that Wells Thompson had sold the mill to defendant.

The testimony showed a parol sale, by A. Watt Thompson, while in possession of the land, to McNeel, in November, 1866; that in August, 1867, McNeel proposed selling it to Brown, and they, Brown and McNeel, in negotiating, went to A. Watt Thompson, who then executed a bill of sale, of date 30th September, 1867, for the mill, to McNeel, who, selling it to Brown, assigned to him the bill of sale; that May 15, 1869, Brown sold the mill to plaintiff, indorsing the bill of sale to him.

The defense showed the deed from Mrs. Nancy Thompson to Wells Thompson and A. W. Thompson; deed of A. W. Thompson, for his interest, to Wells Thompson, of date November 26, 1866, recorded July 15, 1867, and Wells Thompson's sale and delivery of the mill to the agent of defendant.

It also appeared in evidence, that A. W. Thompson, at his sale, agreed with McNeel, that the mill could remain on the plantation until it should be convenient to move it; that Wells Thompson refused to ratify the sale to McNeel; and that at his purchase, McNeel did not know that A. W. Thompson had sold his interest in the plantation to Wells Thompson, and that A. W. Thompson was not the general agent of Wells Thompson.

The further facts necessary are given in the opinion.

The jury returned a verdict for plaintiff, and Hutchins appealed.

Waul and Walker, for appellant, cited *Fains v. Walker*, 1 Bailey, 540; *Powell v. Monson & Co.*, 3 Mason, 459; *Bratton v. Crawsen*, 2 Strobb, 478; *DeGraffenreid v. Stubbs*, 4

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Humph., 451; Cook v. Whitney, 16 Ill., 480; Schouler on Per. Prop., 150; 2 Kent, 441; Walker v. Sherman, 20 Wend., 636; Bringhoff v. Munzenmaier, 20 Iowa, 513; Richardson v. Copeland, 6 Gray, 536; 1 Stark. Ev., 594, 655: 1 Greenl. Ev., secs. 275, 276; Rockmore v. Davenport, 14 Tex., 604.

William Fort Smith and Thos. G. Masterson, for appellees. .

MOORE, ASSOCIATE JUSTICE.—In no view which we have been able to take of this case, can the judgment be sustained.

On the trial in the court below, the presiding judge instructed the jury upon the hypothesis that in selling the mill in controversy, Asa Watt Thompson may have acted as the agent of the owner; but as there is no evidence in the record tending to show that he pretended to act in a representative character in the transaction, or was understood by purchaser as doing so, nor anything whatever shown which can be regarded as justifying or warranting an inference that he had any such authority,—while on the other hand, the contrary seems to be clearly established,—it is unnecessary for us to give any consideration to this view of the case.

The validity of the judgment, consequently, depends entirely upon the fact whether said Thompson had any title to or interest in the mill at the time of the alleged sale under which it is claimed by appellees; and if so, whether this sale was legal, and vested in the purchaser a valid title to the mill as against Wells Thompson, the subsequent vendee of said Asa Watt Thompson's undivided half of the land. Before we can properly determine these questions, it is necessary that we shall ascertain what, in contemplation of law, was the true nature and character of the property at the time of the sale, upon which appellees rely to maintain their action. Was it a chattel, or was it so fixed or annexed to the land as to have become, in contemplation of law, a part of it?

The word "fixture," if a legal term, which Lord Campbell seems to doubt, it is universally conceded, is, as a substan-

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tive term, of modern origin. And, as has been frequently said, there is no other legal term in so general use to which there has been more different and contradictory significations attached. (Ewell on Fixtures, 82.) To a great degree, this has been occasioned by the different standpoints from which the questions touching its application have been viewed: the relation of the parties regarding it, the degree of fixedness of the property involved, and the purpose or intention with which the article in question was annexed to or placed upon the land. The necessary consequence of this absence of certainty and uniformity in the use of the word, has occasioned confusion and conflict in the decisions on the subject, in respect to the rights of parties interested in its determination in the great number of cases in which, in recent times, it has been under discussion; and especially in reference to the proper tests for determining whether the particular article in question should be regarded as a fixture or not.

It is said, the weight of the modern authorities establish the doctrine that the true criterion for determining whether a chattel has become an immovable fixture, consists in the united application of the following tests:

1st. Has there been a real or constructive annexation of the article in question to the realty?

2d. Was there a fitness or adaptation of such article to the uses or purposes of the realty with which it is connected?

3d. Whether or not it was the intention of the party making the annexation that the chattel should become a permanent accession to the freehold?—this intention being inferable from the nature of the article, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and purpose or use for which the annexation is made.

And of these three tests, pre-eminence is to be given to the question of intention to make the article a permanent accession to the freehold, while the others are chiefly of value as evidence as to this intention. (Ewell on Fixtures, 21, 22.)

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It is also to be noted, that owing to the greater relative importance and value now attached to chattels than formerly, and, in the interest of manufacture and commerce, a much more liberal rule has been adopted, in determining whether or not chattels which have been placed upon land by lessees and tenants are permanently annexed to it, than once prevailed. It is well settled, however, that there has been no such modification in the ancient rule, in the absence of evidence of intention to vary their rights, as between grantor and grantee. (2 Kent, 345; *Kinsill v. Billings*, 35 Iowa, 154; *De Graffenreid v. Stubbs*, 4 Humph., 451.)

Tested by these well-established principles and rules for our guidance in determining the question, there can, we think, be no hesitancy in concluding that the mill in question was attached to and passed as a part of the realty, by the deed of Mrs. Thompson to her sons, Asa Watt Thompson and Wells Thompson. If it was not a part of the realty, but continued to be a chattel, and did not pass with the land by the deed, then it is not shown that said Asa Watt Thompson ever had any title to or interest in it. And as neither his vendor, nor any of the parties claiming under him, ever had possession of it, it follows that appellees have no foundation to support their action.

On the other hand, if the mill was annexed to and part of the land, a parol sale of it, even by the owner of the land, would be void, because in conflict with the statute of frauds. (*Landon v. Platt*, 34 Conn., 517; *Myers v. Schimp*, 67 Ill., 469.) And if this was not so, as the property still remained annexed to the land, it must be held that the vendee, Wells Thompson, who had no notice of the previous contract for the sale of the mill by his vendor, got, by his deed, the better title. (*Bringham v. Munzenmaier*, 20 Iowa, 513; *Richardson v. Copeland*, 6 Gray, 536.)

REVERSED AND REMANDED.

Justice Gould did not sit in this case.

Statement of the case.

JACOB HART ET AL. V. JACKSON RUST.

1. **DELIVERY OF DEED.**—The fact that a deed, after its delivery to the grantee, had been by him returned to the grantor, for safe keeping, during the minority of the grantee or during an expected absence, neither negatives or disproves its previous delivery, nor annuls or destroys its effect to pass title to the property embraced in it, as between the parties.
2. **CONSTRUCTION OF DEED.**—When an instrument is drawn in the form of a deed, and delivered as such, couched in appropriate language to indicate its purpose and have effect as such, the court will not, by construction, give it a different effect.
3. **SAME.**—An instrument made and delivered by a father to a son, purporting to convey lands and other property to a minor son, in carrying out a partition of the greater part of the father's estate between the minor and a married sister, to whom a like share had been at the same time conveyed, and providing that the parents, or the survivor, shall have the possession during life, and in event of the death of the grantee without issue, and made at the same time that a will was written and signed, will not be construed, as between the grantee and the legal representatives of the father, to be a will, but will be held, as between such parties, a deed.
4. **SAME.**—Nor will the fact that sufficient property was not retained by the grantee, invalidate such a conveyance, as between the grantee and the legal representatives of the grantor.
5. **SAME—RIGHTS OF CREDITORS.**—Only creditors or purchasers without notice of such deed, or parties holding under such, could attack the deed.
6. **SAME.**—A direct proceeding on the part of creditors, or for their use, would be required to reach the estate, conveyed by such deed, by having the conveyance annulled.
7. **EXECUTION OF POWER.**—One of several trustees, in whom is vested the power to sell, cannot execute a conveyance that will pass title to the trust estate.
8. **SAME—EXECUTORS.**—Where two executors are appointed with power to administer an estate, without control of the Court of Probate, and both qualify, a deed by one for land of the estate, is inoperative.
9. *Johnson v. Bowden*, 37 Tex., 621, and 43 Tex., 676, distinguished from this case.

APPEAL from Wharton. Tried below before the Hon. William H. Burkhart.

By an act of the Legislature of the State of Texas, ap-

Statement of the case.

proved January 16th, 1858, and taking effect from its passage, the county of Wharton was given power to levy, upon all persons and property in the county, a special tax to aid in the construction of a railroad from Brazoria county to some point in the county of Wharton; and it was provided, (sec. 4,) that if the County Court should fail to levy and collect said tax, the act itself levied it.

Under this law a tax was levied by the County Court, 22d May, 1858, and annually thereafter.

On 20th May, 1859, A. C. Horton, and other dissatisfied tax-payers of Wharton county, sued out an injunction to restrain the collection of this tax, and filed bond as required by law. This injunction was dissolved, on motion, by the District Court, in 1859, and the plaintiffs appealed. This appeal remained undetermined until April 18, 1870.

In 1860, according to the tax-rolls of Wharton county, A. C. Horton and wife owned community property, the taxable value of which was \$255,899.

On the 27th day of December, 1861, the war having commenced, A. C. Horton and wife determined to make a division of property between their children, and a testamentary disposition of all their worldly effects. They had but two children—Patience, then wife of I. N. Dennis, esq., and Robert, an unmarried minor. On that day, they executed three written instruments to carry into effect their intention: *first*, to Patience, they made a deed of gift of real and personal property, amounting in value, according to the tax-rolls of 1862, to \$118,180, an advancement; *second*, to Robert, they executed a conveyance of an equal amount, from which we copy: "In consideration of the fact that they have, by deed of even date herewith, conveyed to Patience certain property therein mentioned, and being desirous of securing to their son Robert a like amount of property, do, in consideration of the love and affection they have for him, give, grant, and convey unto him the following property, subject to the trusts and conditions herein mentioned," (then follows description

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of the property conveyed, the balance of the Martin Allen league, including the land in controversy, being conveyed,) "to have and to hold the aforesaid land and negroes, to him, the said Robert, subject to the following terms and conditions, that is to say: We are to have and retain the possession and control of the aforesaid property, lands and negroes, during our lifetime, and upon the death of either of us, the survivor is to have and retain the possession of said property; and we reserve and retain in us the absolute right to have, use, control, manage, and dispose of all the income and profits of said property, (except the increase of the negroes,) during our lives, and the survivor to have the same rights during his or her lifetime after the death of either. In the event of the death of the said Robert during the life of us, or the survivor of us, the lands," &c., "shall revert to us, or the survivor of us, provided, however, he dies leaving no issue. And in the event of his death without issue after our death, the same shall revert to our daughter, Patience, or to her issue, in the event of her death prior to the death of the said Robert."

Signed by A. C. Horton and Eliza Horton, and acknowledged, but not recorded till February 12, 1866, after A. C. Horton's death.

Third, A. C. Horton made his will. 1st clause recites, that having this day given, by deeds of conveyance or gift, certain lands and other property to his children, he bequeaths to his wife, after the payment of his debts, the remainder of his property, for life; 2d clause wills his wife the plantation, tools, &c., on the plantation, deeded to Robert by deed of this date; 3d clause provides for an equal division, after his wife's death, between his two children, or their issue; 4th clause appoints J. N. Dennis and testator's wife executors of his will, and takes the administration out of the Probate Court.

Dennis and wife went into immediate possession of the property conveyed to them.

The deed to Robert Horton was handed him when made, but returned to A. C. Horton, by Robert, for safe-keeping.

Statement of the case.

A. C. Horton and wife retained possession of all the property conveyed to Robert. The deed to Robert never afterwards came into the possession of Robert until after his father's death.

In 1861, prior to these transfers, the tax value of A. C. Horton and wife's property was \$255,899. They gave to their daughter, in value, \$118,180, as shown by tax-rolls of 1862. They gave to Robert a like amount, \$118,180, leaving in their hands, (if the transfer to Robert was held to vest a present title as against creditors,) liable to debts, only the sum of \$28,431. They owed, in 1861, according to the testimony of Phillips, besides the taxes due and unpaid, and other debts, \$76,000; and up to 1865, so far as we can discover from the evidence, only \$10,000 of that debt had been paid. The mortgages seem to indicate that a South Carolina debt was \$64,000 instead of \$60,000, as Phillips testifies.

Being thus indebted, Dennis and wife, on 27th December, 1861, in consideration of the deed of gift from A. C. Horton and wife, executed a covenant to Horton and wife, agreeing that the property that day conveyed to them by deed of gift should be bound for one half of A. C. Horton's debts, with some provisos. This document, it appears, however, was never acknowledged for record, or recorded, but simply transcribed in a record-book, from which it is taken.

In 1865, A. C. Horton died. August 27, 1866, the will was probated and the executors qualified. Mrs. Horton, executrix, on 28th January, 1867, returned an inventory of A. C. Horton's estate, including therein 2,400 acres of the Martin Allen league, the same land conveyed to Robert in 1861, and it includes the land in controversy.

Robert Horton, in 1866 or 1867, went into possession of the land in controversy, by consent of the executors; and says that he considered he went into possession under the deed of 27th December, 1861, and also as heir.

On 28th September, 1868, C. S. Betts and Jackson Rust each obtained a judgment against Robert Horton, together amounting to \$1,735.57. Meantime the tax injunction

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suit was pending. No railroad taxes had been paid by A. C. Horton, or his estate, since it had been sued out. On 10th April, 1870, the Supreme Court affirmed the judgment in the court below, dissolving the injunction.

By copies of records of decrees annexed to motion for a new trial, it appears that on 20th December, 1870, Horton's estate being represented as insolvent, 200 acres of the Martin Allen league were set apart for the widow, upon the petition of herself and her son Robert; and on 6th December, 1871, 280 acres were sold off the same land to pay widow's year's allowance.

November 7, 1871, Wharton county sued the executors of Horton's estate for the railroad taxes accrued from 1859 to 1864, inclusive, and 14th December, 1871, recovered judgment for \$3,572.89. The judgment directs personal property to be sold to pay the debt; and if none exists, then, real estate.

February 6, 1872, I. N. Dennis, executor, sold forty acres of the Martin Allen league, a part of the land included in the deed to Robert Horton of December 27, 1871. A. D. McLean purchased it for \$340. Deed was made April 1, 1872.

Dennis, executor, had a tenant on the land when McLean purchased it, who attorned to McLean, and paid him rent from January 1, 1872. January 3, 1873, McLean sold to Jacob Hart. McLean and Hart have had possession ever since McLean purchased.

September 14, 1872, executions issued on the two judgments mentioned, in favor of C. S. Betts and Jackson Rust, against Robert Horton; were levied upon Robert Horton's interest in the Martin Allen league, which was sold by the sheriff and purchased by Jackson Rust, at 12½ cents per acre.

February 20, 1873, Mrs. Eliza Horton, in consideration of the obligation of Jackson Rust to deed to Robert Horton or his wife, two hundred acres of land, released, by a conveyance to Jackson Rust, all her right, title, and interest in the

Statement of the case.

Martin Allen league. January 4, 1873, this suit was brought. Rust brought trespass to try title against Hart & McLean. Defendants set up their title under the sale for tax, in defense.

On the trial, plaintiff, over objections which are given in full in the opinion, read the deed from A. C. Horton to Robert J. Horton, substantially set out above, also the judgments, one in favor of Betts, the other in favor of Rust, against Robert Horton; executions issued under them; levy upon the land described in the petition; and the sheriff's deed conveying to Jackson Rust the interest of Robert Horton, in said land, of date November 5, 1872.

Robert Horton testified, that at the execution of the deed to him there was a division made by his parents, of the negroes, between his sister, Mrs. Dennis, and himself. The slaves selected for him, and the land, were conveyed by the deed, and the deed was handed to him by his father, A. C. Horton, he saying, "here is the deed to your property." Witness placed the deed in the hands of his father for safe-keeping; that after his father's death, he held possession of the land, &c.

Plaintiff then read release to him, by Mrs. Eliza Horton, widow of A. C. Horton, of date February 20, 1873, for the land in controversy, of all her interest. It was admitted that both parties claimed under A. C. Horton.

The defendant proved, that the consideration of Mrs. Horton's release to Rust was his release to Robert J. Horton or his wife of two hundred acres of land; that at the time Dennis, executor of Horton, sold to McLain, there was a tenant on the land, about April 1, 1872; that McLain, about January 1, 1873, sold to defendant Hart, who then took possession of the forty-acre tract so purchased of Dennis.

Defendant then read in evidence the will of A. C. Horton, (substantially as stated above,) admitted to probate August 29, 1866, and inventory of Mrs. Horton, containing the land in controversy.

It was admitted that both I. N. Dennis and Mrs. Eliza

Argument for the appellants.

Horton qualified as executor and as executrix under the will. The injunction proceedings, as stated above, were admitted; also the proceedings, as stated, to enforce the accumulated railroad tax by suit against I. N. Dennis and Eliza Horton.

Defendant proved that, at the date of the deeds to Mrs. Dennis and to Robert J. Horton, A. C. Horton was indebted about \$80,000, of which a debt of \$60,000 in South Carolina was included; that A. C. Horton, in 1863, went to South Carolina for the purpose of paying the debt, and on his return said he had settled it in part; that \$10,000, in favor of one Cardwell was paid by Horton before his death, in 1865. It was stated that Horton was always regarded as solvent.

The deed from I. N. Dennis, as executor, was then read, conveying forty acres to A. D. McLain, of date April, 1872—the deed reciting that the sale was made under the judgment for the said taxes, and to the highest bidder.

It was admitted that Mrs. Eliza Horton refused to join I. N. Dennis in the deed to McLain. In rebuttal, it was proven that A. C. Horton, during his life, was always regarded as solvent. An agreement by Dennis and wife was read, by which they agreed to hold the property deeded to Mrs. Dennis, subject to half of the debts of A. C. Horton, in case of his death, and after the claims due him had been applied to their satisfaction.

Judgment was rendered for plaintiff, and defendants appealed.

A. B. Peticolas, for appellants, after stating the case, argued:

I. What is the proper construction, under all the facts, to be placed upon the conveyance from A. C. Horton to Robert, and what estate is granted by it?

It is submitted, that Wharton county was a community creditor for the tax from 1856 to 1865, and that by their purchase from the executor of the property sold to pay that debt, after it had become a judgment, appellants have all the rights, and are entitled to all the protection, that Wharton

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county had or was entitled to; and as the purchasers at the sale satisfied a valid judgment against the estate, they are subrogated to all the rights of the judgment creditor. (*McDonough v. Cross and Wife*, appeal from Rusk, decided March 30, 1874. [Wharton county was prevented from collecting this debt by the injunction of the tax payers.] The property conveyed to Robert Horton was community property, and the conveyance was avowedly made to him because he was an heir, and in consideration of love and affection. It was made by his father, at a time when he was heavily in debt, and did not have enough property, without that conveyed to his two children, to meet his debts. So thoroughly was Horton satisfied of that, that he clogged the property conveyed to Mrs. Dennis, with a responsibility for his debts; not, however, to benefit creditors, but in order to prevent the shares of his two children from becoming unequal, by reason of Robert's share having to bear the burden of all the debts, and thus being made less.

If this conveyance could take effect at all, as to creditors, as a deed, it could only take effect upon the day of its registration, April 12, 1866. The Wharton county debt had then all accrued; and as this was a mere voluntary conveyance, it must be held void as to subsisting creditors. (*Paschal's Dig.*, 3876; *Raymond v. Cook*, 31 Tex., 384-6.)

A purchaser at sheriff's sale takes only the title that the judgment debtor had. Therefore Rust is in the shoes of Robert Horton, so far as the defendants are concerned, because McLean's title was of record before Rust purchased. McLean acquired all the rights of Wharton county by his purchase, and the controversy is narrowed down, upon this question, to a controversy between a creditor of the estate and an heir claiming under a deed of gift not yet made operative by present right of possession. A title from an administrator, under a sale made for the payment of debts, is better than the title of the heirs, accompanied by five years' possession. (*Cornett v. Williams*, 20 Wall., 226.)

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Even an absolute and unconditional advancement is liable to the debts of the donor, existing at the date of the advancement, upon the ground of presumptive fraud.

A judgment creditor, whose debt existed prior to a donation, *inter vivos*, but who obtained his judgment after the donation was made, can have the donation set aside as presumptively fraudulent, and the property donated subjected to the payment of his debt; provided the donee fail to show other property, unincumbered, to an amount sufficient to pay the debt. (*Chase v. McCoy*, 11 La. Ann., 195; *Caswell v. Hill*, 47 N. H., 407.) And the donation, or advancement, need not be of such an amount as to threaten insolvency, in order to render the deed presumptively fraudulent and void as to creditors.

In *Lowry v. Fisher*, 2 Bush, (Ky.), 72-77, it appeared that in 1859, Lowry owned property to the amount of \$100,000; that he owed debts of his own, \$20,000, and was liable as security on bonds, &c.

In 1859, he made a deed of advancement to one of his children, who went into possession of the property, to the amount of \$18,600. In 1862 and 1863, creditors sued to set aside the deed to his son, and the court held it void as to existing creditors. (See also *Mitchell v. Berry*, 1 Met., (Ky.), 602.)

The leading case on this subject, in Maryland, is *Williams v. Banks*, 11 Md., 199. In this case, Mrs. Chase, being very wealthy, made a deed August 22, 1844, conveying to trustees all of her property, to hold in trust for her (the grantor's) own use, during her life, paying to her the incomes arising therefrom, which amounted to the sum of \$4,337 per year, and, after her death, remainder to her daughter and grandchildren. She was ninety years old when the deed was made. When she made the deed, she owed \$3,956, and it required for her support \$200 annually. The courts, citing *Reade v. Livingston*, 3 Johns. Ch. Rep., 481; *Salmon v. Bennett*, 1 Day, (Conn.) Rep., 525, decided that no fraudulent intent was neces-

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sary to make a voluntary deed to children void as to existing creditors. Speaking of Mrs. Chase, the court said: "Although she lived some four years after making the deed, and during that period her life estate may have yielded sufficient funds to have paid all her debts and the liabilities for which she was bound to make ample provision at the date of the deed, still that instrument cannot be relieved from the effect of the imputation of fraud, at its date, in regard to those debts and liabilities, if they have not been actually paid, and it is not alleged they have." And on page 254, they say: "In this case, however, we do not believe there was any intention, on the part of Mrs. Chase, to commit any fraud, whether on existing or subsequent creditors;" but the deed was set aside and held invalid, as to existing creditors, when it was made. And on the subject of the rights of creditors to have preference to heirs, and upon the subject of the executor's power to make sale of the property to pay A. C. Horton's debt, see *McDonough v. Cross*, appeal from Rusk, decided March 30, 1874. (*Kehr v. Smith*, 20 Wall., 31.)

It is said, the gift is not yet operative by the right of possession, for Mrs. Horton's deed of release cannot operate to give Rust the present right of possession as against a creditor. (*Mitchell v. De Witt*, 20 Tex., 299.)

It is not deemed important to discuss defendant's title, as plaintiff must recover upon the strength of his own title; but we quote here authority to show that one executor alone may convey perfect title. (*Williams on Exrs.*, 810, 811, 813; *Redfield on Wills*, 222, 223; *Johnson v. Bowden*, 37 Texas, 621; 8 Tex., 235.) But this is altogether a collateral issue, which cannot be made in this action. (*Cornett v. Williams*, 20 Wall., 246; *Bogges v. Howard*, 40 Tex., 153.) And for authority to take a money judgment for a debt against an estate, without making the heirs parties to the suit, we refer to the probate law of 1870, sec. 160.

II. We reach now the second question: What estate is

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granted by Robert Horton's deed, and what is the proper construction of it?

Suppose we are in error in our foregoing conclusions, and that Rust's title is entirely unaffected by the fact that appellant represents a creditor of the community, seeking to recover a community debt from a community fund—what interest was, by the deed of the 27th of December, 1861, conveyed to Robert Horton?

It is certainly not a fee-simple title. "A fee simple is a pure inheritance, clear of any qualification or condition. It is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land." (4 Kent, 5.) Nor is it an advancement. An advancement is a gift from a parent to a child, by anticipation of what it is supposed a child will be entitled to at the death of a parent. (*Cawthorn v. Coppedge*, 1 Swan, 487; *Holliday v. White*, 33 Tex., 447.) But to constitute an advancement, the ancestor must, in his lifetime, divest himself of all interest in the property. (*Gray v. Gray*, 22 Ala., 233; *Crosby v. Covington*, 24 Miss., 619; *Bing. on Desc.*, 316.) It is a grant simply of a contingent interest in land, which may never take effect in possession.

Devise to S for life, and after his death, to W, if then living, and if W is not living, then to the heirs of W, gives W only a contingent interest. (*Bing. on Desc.*, 64.)

It grants to Robert Horton a contingent interest, because it depends upon his outliving his mother. Nor does it grant him such an estate, nor are the limitations over of such a character as to give room for the operation of the rule in *Shelly's* case, and raise a contingent fee in him, to become absolute, in the event of his outliving his mother. First, because the limitation over is to named persons, and is to take effect if he dies without issue. Second, because the limitations over would not create an entail at common law. (*Anderson v. Jackson*, 16 Johns, 382; *Bing. on Desc.*, 136, 438.) Third, because the property is not limited, to go at

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his death, as it would go by the law of descents and distributions. (*Hancock v. Butler*, 21 Tex., 808, 812; *Daniel v. Whartenby*, 17 Wall., 640; which last case is conclusive on the point.)

We have thus endeavored to show the *quantum* of interest taken by Robert Horton under the grant from his father, but it still remains to consider in what right or capacity he took. Did he take as a purchaser? and does he come into this court in the same attitude as one who has bought and paid for a valuable right, or does he take simply as heir only, and are his rights those of an heir, and nothing more? * * *

Such a conveyance as that to Robert Horton has always been construed to be a will. (*Crain v. Crain*, 17 Tex., 87-90; 21 Tex., 796; *Ferguson v. Ferguson*, 27 Tex., 340, 343, and authorities there cited; *Ellison v. Keese*, 25 Tex. Supp., 83, 90; *Millican v. Millican*, 24 Tex., 441, 442; see on this point, as almost precisely in point, *Woodall v. Rudd*, 41 Tex., 375.) There is no question in this case as to the possession. There never was seizin of the property in Robert Horton. The terms of his conveyance, even up to this day, (his mother being still alive,) prohibits him from claiming possession under that, and it is clear he has none in any other right; and there was nothing to indicate to creditors even a contingent right in him to future possession, until his deed was recorded in 1866.

We conclude then, that the writings of December 27, 1861, were all, to a certain extent, testamentary; and by analogy to the rules governing contracts, we may say, that cotemporaneous writings between the same parties, with reference to the same subject-matter, are parts and parcels of the same transactions. (*Dunlap v. Wright*, 11 Tex., 602; *The Howards v. Davis*, 6 Tex., 180.) Robert Horton, if he takes at all, takes under this will in disguise, and takes as an heir; and as heirs cannot take until their father's debts are paid, the title of a judgment creditor to the land, sold to pay the ancestor's debt, is bound to be better than the title of the heir.

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The common property is a security for the community debts, and neither the heirs of the wife or husband have any interest, except in that portion which remains after the payment of such debts. (*Thompson v. Cragg*, 24 Tex., 600; *Burleson v. Burleson*, 28 Tex., 418; *Paschal's Dig.*, art. 4646; *Succession of W. G. Kerby*, 18 La. Ann., 434, 582; *Lawson v. Ripley*, 17 La., (O. S.) 247, 248; *Hart v. Foley*, 1 Robin., (La.,) 380, 381; *Fortier v. Slidell*, 7 Robin., (La.,) 404; *Succession of Thomas*, 12 Robin., (La.,) 215, 266.)

If the conveyance to Robert Horton is a will as to him, it is equally a will as to Mrs. Horton, for her rights under it did not vest until after the death of A. C. Horton, so far as A. C. Horton's interest in the property was concerned; and as to her own interest, reserved to herself by herself, in the instrument, it was no less and no greater than she had by virtue of her being one of the partners in the community without it. The effect of the opening of administration upon A. C. Horton's estate was, to suspend her interest in the community until the debts of the estate were paid and the administration was closed. An administration upon a community estate operates as well upon the wife's as the husband's interest. (*Tucker v. Brackett*, 28 Tex., 339, 340; *Estate of Tomkins*, 12 Cal., 114.) She cannot by her own deed to her son, reserving a life estate to herself, withdraw any part of the community property from its liability for community debts, and vest that interest so withdrawn in herself, free from that liability, any more than her husband could. A vendee takes subject to the administration. (*Mitchell v. DeWitt*, 20 Tex., 299.)

III. What is the legal force and effect of Mrs. Horton's deed of release to Jackson Rust? If the last foregoing propositions be correct as law, I have, in them, almost fully answered the question. But her position when she made this deed of release, and her actions and representations with regard to the property conveyed, must be considered. It is conceived that these operate upon her and her privies in estate, as an

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equitable estoppel, and are sufficient to prevent her or her privies from now setting up an adverse claim to her life estate in this property, as reserved in the deed to Robert Horton:

First. In a sworn inventory she returns this property as belonging to the estate of A. C. Horton. Second. The executors of the estate of A. C. Horton have, since 1866, managed and controlled it as executors, and put tenants upon it, and, we may fairly presume, received and used the proceeds of it in the administration. Robert himself went on it by their consent. Third. She has never, so far as the evidence shows, set up a claim to the right of possession or profits of this property, as against the estate being administered. Fourth. She has had a homestead set apart out of it as a part of A. C. Horton's estate, and also a year's allowance. Fifth. She has, without a word of complaint, allowed her co-executor to sell it to pay the debts of the estate. And after all this, and after McLean has paid his money, received his deed, and recorded it, she sets up a claim to it adversely to the estate. She is estopped by her conduct and by her silence, when she should have spoken, and Rust, who is a privy in estate, is also estopped. (Big. on Estop., 425, 493, 500, 501.)

We are aware that an administrator, by the decisions of our State, is not estopped by the return of an inventory alone from asking to amend it, and taking therefrom property claimed by himself, but this has never been held in a case where the rights of third parties have intervened and the title to the property has passed out of the estate. But, on the contrary, a purchaser under such circumstances, who has paid his money, has been protected as an innocent purchaser even as against minor children who were not (upon the face of the records) parties to the decree of partition under which the separate property of their father was partitioned as community property. The property was afterwards sold by the widow, and it was held that the heirs could not recover of the purchasers. (*Davis v. Wells*, 37 Tex., 606.)

Upon the whole record, we believe that there is no title in

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Jackson Rust that can support an action of trespass to try title as against appellant. If Robert Horton takes as heir, and takes a contingent interest in lands only, he takes such a mere equitable interest as cannot be sold under execution. (Rorer on Judicial Sales, 5541; Hendricks v. Snedikir, 30 Tex., 306; Curlin v. Hendricks, 35 Tex., 247.)

And it would seem to be a safe rule not to permit heirs to recover property of the estate in their own name, unless they make it appear that the administration has been closed, or that no debts exist against the estate. (Giddings v. Steele, 28 Tex., 743; 20 Wallace, 226.)

Appellee's title is not supported by the release from Mrs. Horton, for it seems clear that she is estopped from claiming the right released as against appellants. And lastly, if all our previous positions are erroneous, it is clear that neither the estate nor the heirs of the deceased debtor can recover back the property sold to pay the ancestor's debt, without refunding the purchase-money, as a judgment debtor is required to do when an execution sale is pronounced invalid. (Howard v. North, 5 Tex., 290; Herndon v. Rice, 21 Tex., 450; Andrews v. Richardson, 21 Tex., 287.) So that we think we are authorized in asking the court in this case to reverse and dismiss.

George Quinan, for appellee.

MOORE, ASSOCIATE JUSTICE.—This suit was brought by the appellee for the recovery from the appellants of forty acres of land, a part of the Martin Allen league, which is admitted by both parties to have formerly belonged to A. C. Horton, and under whom they both claim to derive title.

A number of questions of much interest have been discussed by counsel, the proper determination of some of which is by no means free from difficulty. It is not necessary, however, in the view we take of the case, for us to pass upon but few of them; and these are not believed to be of difficult

solution. The point upon which appellants chiefly rely in support of their claim to the land, and to defeat that of appellee, is, that the instrument of writing bearing date December 27, 1861, whereby said Horton and his wife is alleged by appellee to have conveyed the land in controversy, and other property, to his son Robert J. Horton, reserving a life estate to themselves, and the survivor of them, and also limiting the estate over, in the event of said Robert's death without issue, is inoperative, and will not serve as a link to connect appellee with said A. C. Horton's title.

1st. Because said instrument never took effect as a deed, for want of delivery, in the lifetime of said A. C. Horton.

2d. Said instrument was testamentary in its character, and was intended by the purported grantors to have effect as a will, and not as a deed.

3d. Said instrument was not made upon any valuable consideration, but was altogether voluntary, and therefore fraudulent and void, at least as to existing creditors of the grantors, at the date of its execution, or when it took effect, and as to those claiming under such creditors, or in their right.

The proof shows that the parties interested in the business to which the instrument of writing in question relates, were all present when it was executed, and were also present when the personal property was divided, and the shares allotted to the donees were set apart and pointed out to them as their property; and after said instrument had been signed by the grantors, and attested by the subscribing witnesses, it was handed to the grantee by the grantor, who said, as he handed it to him, "Here is the deed to your property." That this was a full and complete delivery of it to the grantee, admits of no question. The fact that the deed was subsequently returned to the grantor, to be preserved and taken care of by him for the grantee during his minority and contemplated absence in the army, neither negatives or disproves its previous delivery, or annuls or destroys its effect to pass the title of the property embraced in it, as

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between the parties to it. (4 Kent, 455, 456, and notes; Hillebrant v. Brewer, 6 Tex., 49.)

We can perceive nothing in the instrument, or the circumstances connected with its execution, to warrant the inference that it was intended by the grantors to have effect as a will, and not as a deed. It is drawn in the form and was delivered to the grantee as a deed; was couched in appropriate language to indicate its purpose and have effect as a deed. Where this is the case, the court will not, by construction, give an instrument a different effect from that ordinarily imputed to it. This instrument was evidently intended to serve a like purpose, and to have like effect, as the conveyance to Mrs. Dennis for the property given to her. It certainly cannot be held that this was a will and not a deed, and that no right or title to the property therein conveyed, vested in her until after her father's death. The will, made by Horton on the same day that these instruments were executed, shows that he understood perfectly well the difference between them and the will, and his intent and purpose in making them. (Ferguson v. Ferguson, 27 Tex., 339, and case cited.)

It is unnecessary for us to consider whether an advancement or a voluntary settlement of property upon a child, by a parent, who does not retain ample means in his hands to discharge all his debts, is fraudulent and void as to existing creditors or not. For, if it is admitted that the deed is, in such case, invalid as to creditors and *bona fide* purchasers from the donor, it is unquestionably valid and effectual between the parties to it and their privies. If, therefore, the deed from Horton to his son should be regarded as fraudulent in law, for want of a valuable consideration, or, if it was admitted to be fraudulent in fact, though such an assumption is clearly repelled by the entire evidence in this record, it is unquestionably valid and binding upon Horton and his heirs, and *prima facie* so at least on his legal representatives. Therefore, as the appellee had acquired, previous to bringing his suit, the life estate reserved by the deed to Mrs. Horton,

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as the survivor of her husband, as well as all the interest vested by it in Robert Horton, appellants have no right to complain of the judgment, unless they are creditors or purchasers of the grantors, without actual or constructive notice of the deed, or have acquired a right or interest in the land through or under such creditor or purchaser.

It is not pretended that Horton was ever indebted to appellants, or either of them. The only title which, it is claimed, they have to the land, was acquired by its purchase from Dennis, one of the executors of said Horton's will, at a sale alleged to have been made by him, under and by authority of a judgment of the District Court of Wharton county, against said Dennis and Mrs. Eliza Horton, as executor and executrix of said A. C. Horton, deceased, whereby said executor and executrix were required by the court, on or before a named day, to sell sufficient of the personal property belonging to said estate, if in their hands, to satisfy said judgment, and in default of such personal property, then to sell real estate.

There are, obviously, at least two fatal defects to the title which appellants claim to have acquired under this sale:

First. While it is now a well-established rule in this State, (however unfortunately or disastrously it may often operate as well to the creditor as to the debtor,) that when property has been conveyed in fraud of creditors, it may be levied upon and sold by the sheriff as the property of the fraudulent grantor, without a proceeding to invalidate or set aside the deed having been previously had, it has never been held, however, that the executor or administrator of the fraudulent grantor has similar authority. Or, if he should inventory and sell the property as a part of the estate, although his application for its sale should be for the payment of debts as to which the conveyance might be fraudulent, can it be claimed that the purchaser at such sale would get title? The executor being the representative of his testator, is, *prima facie*, bound by his deed, and cannot, ordinarily, impugn or

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question its validity. Before such property can be sold by the executor or administrator, the conveyances must be set aside by suit against the grantee, brought by the creditor as to whom it is fraudulent, or by the executor or administrator, if, in any case, a suit of this kind may be maintained by him to annul the conveyance and subject the property to administration for the payment of such creditor. (*Cobb v. Norwood*, 11 Tex., 556; *Avery v. Avery*, 12 Tex., 54; *Connell v. Chandler*, 13 Tex., 5; *Hunt v. Butterworth*, 21 Tex., 138.)

Second. If the land was subject to sale under the order of the court, for satisfaction of the judgment, the sale of it by Dennis alone was unauthorized. By his will, Horton committed the administration of his estate to Mrs. Horton and Dennis, jointly. Both of them qualified, and were acting in settling the estate under the will. By the judgment, they were required, as executrix and executor, to make the sale. It seems to be well settled, when authority is given, by will or otherwise, to executors or trustees to sell land, and where there are one or more acting, all of them must join in the sale, or the execution of the power is invalid. (*Crosby v. Houston*, 1 Tex., 203; *Halbert v. Grant*, 4 Monr., 580; *Taylor v. Galloway*, 1 How., (Ohio,) 232.) In maintenance of the validity of a sale in such case by one of the executors alone, we are cited to the case of *Johnson v. Bowden*, 37 Tex., 621, and might also have been referred to our ruling in the second action between the same parties, where the previous decision is in effect reaffirmed. (43 Tex., 670.) But an examination will show that the point decided by the court was altogether different from that here presented. In these cases, the court held that when authority is given by will to executors to sell land, and two persons are nominated in the will as executors, but one of them dies, or fails to qualify or accept the trust, the power survives, and may be exercised by the party who qualifies and acts. It by no means follows, however, that when both have qualified, and are acting, the power entrusted to them jointly may be exercised by one of them to the exclusion of the other, with-

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out his consent, and, as it seems in this case, against his wish. The judgment is affirmed.

AFFIRMED.

THE COUNTY OF LEON V. WILLIAM HOUSTON.

1. **STATE POLICE—AUTHENTICATION.**—An instrument, on which suit was brought against the county of Leon, was headed as follows: "Pay-roll of special policemen, county of Leon, Texas." Under this was written twenty names of persons, with figures and amounts following each name, as follows, the other nineteen being similar, viz: "John Rose, from September 15, 1871, to October 6, 1871, (19 days,) \$57." Under this instrument, the following certificate: "I certify that the above pay-roll of special policemen of Leon county is correct and just, and that they have performed duty for the number of days specified. A. West, registrar. Approved: James Davidson, ad't gen'l and chief of police, State of Texas:" *Held*, That such instrument could not be made the basis of a recovery against Leon county, under the act of May 2, 1871. (Paschal's Dig., art. 7212.)
2. **PUBLIC OFFICER.**—The power given to an officer, to formally state certain facts, which, when stated by him as prescribed, become the evidence of the liability of another person, is a public trust that must be executed by the person, and in the mode prescribed by the law delegating the authority.

APPEAL from Leon. Tried below before the Hon. John D. Rector.

W. D. Wood, for appellant.

Walton, Green & Hill, also for appellant.

Hancock, West & North, for appellee.

ROBERTS, CHIEF JUSTICE.—This is an action brought against the county of Leon, by William Houston, as the assignee of the claims of twenty special policemen, for their services in that capacity in said county, in the months of September and

October, 1871, in which a judgment was rendered in his favor against the county for the sum of nine hundred and fifty-nine dollars, (\$959.)

The law under which the claim was made, is the third section of the act of May 2d, 1871, entitled "An act to amend an act, entitled 'An act to establish a State police, and provide for the regulation of the same,' approved July 1, 1870," which reads as follows, to wit: "Any number of special policemen, not to exceed twenty in each county in the State, may be appointed by the Governor, or under his authority, and they shall not be sent out of the county, unless under orders from the Governor. These special policemen shall only be paid, when in actual service, the compensation of three dollars *per diem*, in lieu of traveling expenses and all other allowances, and for the use of their horses and arms. This compensation to be paid out of the county treasuries of the counties where employed, on vouchers certified to by the chief of police." (Paschal's Dig., art. 7212.)

The instrument, upon which the suit was founded, was headed, "Pay-roll of special policemen, county of Leon, Texas," under which was written twenty names of persons, with the time and amount for each, as follows, the other nineteen being similar, to wit:

"John Rose, from September 15, 1871, to October 6, 1871, (19 days,) \$57." Under which pay-roll of the twenty persons was written the following certificate: "I certify that the above pay-roll of special policemen, of Leon county, is correct and just, and that they have performed duty for the number of days specified. A. West, registrar. Approved: James Davidson, ad't gen'l and chief of police, State of Texas."

The court held, on the trial, in the rulings upon the exceptions to the petition, upon objection to it in evidence, and in the charge to the jury, that this pay-roll constituted a good cause of action against the county of Leon; and that to recover upon it, all that was necessary was for the plaintiff to

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prove that he was the owner of it, and that it had been presented to and rejected by the County Court before the institution of the suit upon it.

We are of opinion that this view of the law was a material error. It was evidently contemplated that each special policeman should have given to him a certificate, signed by the chief of police, stating the time of his service as special policeman, the county in which he was employed, and the amount of his compensation, which should be his voucher for his services. This certificate of the registrar is not provided for by the statute. Or, it might be that a certificate could be so shaped as to be a substantial compliance with the law, for all of the twenty special policemen together. But in such case, it must have been made by the chief of police.

When the law requires an officer to make a certificate of certain facts, which is to be the authoritative evidence of such facts, the approval by such officer of a certificate of those facts, made by a person who had no authority to make it, would certainly not be a compliance with the law. If, for instance, some one, not authorized, certifies to the acknowledgment of a deed, which is approved by a notary public, it would hardly be contended that it was a good acknowledgment of the deed for record, or as evidence of its execution in a suit in court.

This power given to an officer to formally state certain facts, which, when stated by him as prescribed, become the evidence of a liability of another person, is a public trust which must be executed by the person, and in the mode prescribed by the law delegating the authority.

In addition to this ground of error, it is also contended, that the law upon which the claim is made, is unconstitutional, and that the suit was improperly brought against the county, even if the law was constitutional; and that, if it could have been brought against the county, the court erred in not allowing the defendant to prove that these persons were not appointed, and did not serve as special policeman, and that the

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court erred in aiding the plaintiff's counsel in the introduction of the evidence, and that the court erred in verbally lecturing the jury upon the performance of their duty.

We do not think that the case, as presented in the record, is one which requires of this court a discussion of all these questions.

Judgment reversed and cause remanded.

REVERSED AND REMANDED.

J. N. RODGERS v. DANIEL DAILY.

1. **VENDOR AND VENDEE—PRE-EMPTION.**—One who has entered upon the vacant public domain, as a purchaser from another who assumed to have title, may, on discovering that the land is vacant, repudiate the executory contract for its purchase, without quitting possession, resist the payment of the notes given for the purchase-money, and while in possession, if entitled to pre-empt land, may take steps to secure it as a purchaser.
2. **DESCRIPTION, UNCERTAINTY OF—FAILURE OF CONSIDERATION.**—A bond for title was executed to three hundred and seventeen acres of land, described as "the same upon which he (the purchaser) now resides," and being further described as a part of the O. M. Vinton league. It was afterwards ascertained that neither the house or improvement of the purchaser were on the Vinton league. In a suit by the vendor to collect the purchase-money: *Held*, There being no other description by which the uncertainty could be remedied, and the shape or locality of the three hundred and seventeen acres ascertained, the collection of the purchase-money note could not be enforced on account of failure of consideration.

APPEAL from Houston. Tried below before the Hon. A. T. McKenney, special judge.

This suit was brought in 1869 by Daniel Daily, against J. N. Rodgers, to recover the value of nine thousand pounds of seed cotton, which Rodgers, by his obligation of date October 24, 1868, promised to deliver "in good condition at the gin-house of said Daily, in Houston county, on or before the 1st

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day of December, A. D. 1869, in part payment of three hundred and seventeen acres of land, part of the headright of Oliver Mills Vinton, situate in the counties of Houston and Trinity." The petition alleges a failure to deliver and prays for a judgment for the value of the cotton.

The defendant pleaded a failure of consideration, alleged fraud on the part of Daily, and prayed for a judgment to recover back money paid to Daily on the contract of purchase.

In 1858, Daily contracted to sell to Rodgers two hundred and thirty-eight acres of the T. Robbins survey, in Houston county, which he (Daily) claimed to own, but for which he had not obtained the patent. The war coming on, Rodgers did not finish paying for the land, but did pay some \$230. Daily claimed that in August, A. D. 1868, the Commissioner of the General Land Office assured him that the Rodgers land was within the limits of the O. M. Vinton league, which, also, Daily claimed to own, but had not a patent for. At that time, August, 1868, Daily lifted the Robbins certificate from this land and located it in Jack County. On the 24th of October, A. D. 1868, Daily and Rodgers rescinded the first contract and made a new one, by which Daily contracted, by title bond, to make Rodgers a good title to three hundred and seventeen acres of the Vinton league, embracing "same land on which Rodgers was then living," and had occupied as his homestead with his family since 1858, and which he has occupied, continuously, to the time of the trial. For this land, Rodgers executed to Daily his three promissory notes, for nine thousand pounds of seed cotton, each, and due, respectively, on the 25th of December, 1869, 1870, and 1871. The land was wild when Rodgers went on it, and he made all the improvements on it, amounting to forty acres of improved land, and other improvements to the value of \$1,000. Before the first note became due, Rodgers ascertained that Daily had no title to the land, and when it matured, refused to pay it. Daily thereupon threatened to attach Rodgers's crop of cotton, if he failed to pay; and, upon Rodgers's refusal, sued out an attach-

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ment, and levied it upon ten thousand pounds of seed cotton of Rodgers's crop, valued at \$500. In order to get security on his replevy bond, Rodgers was compelled to turn this over to his securities. In this suit, Daily also asked to have his vendor's lien enforced. This suit was first tried at March Term, District Court of Houston county, for the year 1871, with a verdict for Rodgers, but owing to some errors, a new trial was granted. An order was issued by the court, at that term, to the county surveyor, to run out the lines of the Vinton league, to see if the land bargained for was situate on that league. A few days thereafter, viz, April 17, 1871, Daily located upon the land the Ross M. Bridge's certificate, Rodgers still on the land. In the early part of July, 1871, the county surveyor ran out the Vinton league, and ascertained that the Rodgers land was vacant public domain, as also two tracts which Daily had rented to John Terry and Stanley Watson, which adjoined Rodgers's land.

The surveyor informed Rodgers, Terry, and Watson that they could file a pre-emption claim of one hundred and sixty acres each, as heads of families, on the land upon which they lived, under the pre-emption law of August 12, 1870, by making application to him and having their claims surveyed. In a few days thereafter, July 18, A. D. 1871, Rodgers, Terry, and Watson made application to the surveyor to have their homesteads surveyed. The county surveyor promised Rodgers to survey the land for him in a few days, but failed to do so. He put Rodgers off with promises for several months, and finally refused to survey at all, because, he said, Daily would sue him if he did. Thereupon Rodgers applied for a *mandamus* against him. It appears that Rodgers's, Terry's, and Watson's pre-emptions cover the same land that Daily sold Rodgers, and more.

This case was tried, a second time, at the December Term, A. D. 1873, and, under the rulings of the court, verdict and judgment were given for plaintiff Daily. The defendant

Argument for the appellee.

Rodgers appealed, and assigned many errors, which, in view of the opinion, it is not necessary to specify.

Moore & Spence, for appellant.

Nunn & Williams, for appellee.—We contend that the appellant, having bought the land with full notice of its condition, and never having been evicted or disturbed in his possession, and Daily being able, ready, and willing to make title, as required by his bond, he cannot refuse to pay the purchase-money, as stipulated in his engagement. (*Tison v. Smith*, 8 Tex., 148; *Brock v. Southwick*, 10 Tex., 68; *Cooper v. Singleton*, 19 Tex., 260; *Johnson v. Long*, 27 Tex., 22; *Sugden on Vendors*, 306, notes 345–347.)

“The rule is well established that, where a party in whose favor something is to be done, in consideration of his promise to pay a certain sum of money to another, prevents that performance, and the other is not in default, the money may be recovered as if the act had been performed;” and in support of this doctrine, we cite *Kennedy v. Kennedy*, 2 Bibb., 464; *Marshall v. Craig*, 1 Bibb., 389, 390.

It is believed that, in all cases that may be invoked to support the appellant’s claim as a pre-emptor, the conditions of the pre-emption grant will be shown to have been fully complied with; and further, that no actual possession, with improvements, have passed.

The fees were not tendered in this case till July, 1872. To have perfected a pre-emption right, it being otherwise unobjectionable, the selection and survey should have been made prior to August, 1871, and field-notes returned. It is not conceived that anything short of doing all that was needful to subject the surveyor to the demand to make the survey, and to *mandamus*, if need be, would have been a compliance with the law. (*Glasscock v. The Commissioner*, 3 Tex., 53; *Marshall v. Clark*, 22 Tex., 31, 32; *Winder v. Williams*, 23 Tex., 603, 604.)

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And it is further submitted, that, if the surveyor, for any cause, failed or refused to make the survey, a proper demand having been made, and he being therefore legally bound so to do, then it was incumbent upon the applicant to apply to the courts for *mandamus* to compel the surveyor to perform a duty within the time allowed him by law to make this claim. (Teell v. Huffman, 21 Tex., 782.)

Failing in this, it is conceived that the party seeking the survey has so far acquiesced as to become responsible for the failure to do what the law expressly enjoins as the condition of the State's bounty.

He has not surveyed the land and returned the field-notes within twelve months, as required by law. He has not paid or tendered the surveyor his fees, nor has he, within twelve months, taken *mandamus* against the surveyor, to compel him to do what is so needful to the pre-emption right. Can he, at a subsequent time, do these things, and thereby acquire rights which have already been forfeited, (if they ever existed,) and this, too, having the effect to divest Daily of legal rights duly acquired?

ROBERTS, CHIEF JUSTICE.—The trade between the parties for a tract of land of 238 acres, identified by metes and bounds, being part of the land upon which the Thomas Robbins's certificate was located by Daily, being cancelled, it is unnecessary to make any further reference to it.

After it was cancelled, the Robbins's certificate having been previously lifted and located elsewhere, the land was vacant public land, and the obligation sued on, which was given for 317 acres, on which said Rodgers resided, was without consideration. Nor are there any facts shown in the record, which, by reflection back upon the transaction, could make it a valid cause of action; for Daily had no title to the land when the obligation was given, nor when the suit was brought. And by the evidence of Cundiff, his own witness, and the chain of title from Ross M. Bridges, adduced in evidence, it

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appeared at the trial that he had still acquired no complete title. There was no proof that Matilda Bridges and Mary Freeman were the widow and heir of Ross M. Bridges, and if that had been proved, the papers adduced showed that Daily and Cundiff owned the land, and not Daily alone.

Giving a bond for title was an implied assumption that he had, at the time of the sale, some sort of title, that either was perfect, or might be perfected, or made valid. That entered into the consideration of the obligation for the cotton.

Rodgers, upon finding that the land was entirely vacant, had a right to repudiate the executory contract in relation to the purchaser of it. (*Green v. Chandler*, 25 Tex., 155.) Being public land, and Daily having no sort of claim to it, either at the sale or at the bringing of the suit, Rodgers was not bound to surrender or abandon the possession of the land, but might take steps to appropriate, by pre-emption, one hundred and sixty acres of it as a homestead, under the law of 1870. (*Paschal's Dig.*, arts. 7045, 7048; *Wheeler v. Styles*, 28 Tex., 240; *Spier v. Laman*, 27 Tex., 205; *Jennings v. De Cordova*, 20 Tex., 515; *Cravens v. Brooke*, 17 Tex., 273; *Pain v. Miller*, 35 Tex., 79.)

The bond from Daily to Rodgers does not describe and identify any particular 317 acres of land, further than being "the same upon which Rodgers now resides," and being on the O. M. Vinton league. Upon a survey being made, it was found that Rodgers's house and improvements were not on the Vinton league; and there were no metes and bounds, or other objects specified in the bond, by which the shape or exact locality of the 317 acres of the land could have been ascertained. This uncertainty was not attempted to be aided by any extrinsic evidence in the record, if it were practicable to have cured so palpable a defect in the bond, so as to make it a valuable consideration for a promise to pay the cotton on the part of Rodgers.

This being a suit upon an obligation for cotton, brought by Daily against Rodgers, and Daily having shown by the

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allegations of his own pleadings, and by the evidence adduced by him on the trial, that the cause of action set forth in his original petition is not a valid one, the verdict and judgment in his favor is erroneous, and must be set aside, irrespective of whether or not Rodgers has acquired any right to the land by his pre-emption claim. It is therefore, in this suit, unnecessary to consider the numerous questions arising upon the charge of the court, the charges refused, the bills of exceptions, and other matters presented in the assignment of errors.

It is not perceived how the cause of action in the original petition can be maintained by any amendment, consistent with the allegations of the amendments that were made, showing that the land for which the obligation was given was entirely vacant and public domain, both when the sale was made and when the suit was brought. Who, now, has the better right to the land, is not the question in this suit. That must be settled in another suit, unless the parties can amicably adjust their respective claims to it.

Because the plaintiff below has failed to show a good cause of action, either in his pleadings or in his evidence, the judgment is reversed, and the cause is remanded.

REVERSED AND REMANDED.

J. L. TOMPKINS v. EMILY TOLAND, ADM'X, &C.

1. **PARTIES—PRACTICE.**—In suits for damages for wrongfully suing out and levying a writ of sequestration, it is proper practice to make the sureties on the sequestration bond parties defendants.
2. **SAME.**—The sureties have an immediate and direct interest in the amount of damages for which they are bound being properly ascertained, and so they are proper parties to a suit by which this is to be done.
3. **DAMAGES TO PROPERTY OF AN ESTATE.**—For damage to the prop-

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erty of an estate, by its wrongful seizure, under a writ of sequestration, an action lies. The fact that the petition contains allegations of wrong to the representative of the estate, will not affect the right of such representative to sue for the injury to the property in course of administration.

4. SEAL.—The fact that a sequestration bond does not require a seal, must be regarded as finally settled.
5. OPINION OF WITNESS.—A question and answer given, which affords a conclusion from facts known to the witness, may properly go to the jury as evidence, though the weight of such testimony be little.
6. FACT CASE.—See facts insufficient to support the verdict.
7. DAMAGES.—Decline in the price of cotton after a sequestration levied upon cotton has been dismissed, and the cotton restored, cannot, in a suit for damages for seizure of such cotton, be charged to the plaintiff in the sequestration suit; nor is loss from improper handling of such cotton, after it was replevied by defendant, to be charged to the plaintiff.
8. ASSIGNMENT OF ERROR.—See assignments held indefinite.

ERROR from Washington. Tried below before Hon. I. B. McFarland.

August 24, 1866, Emily Toland, administratrix of the estate of Joseph Toland, brought suit against J. L. Tompkins and his sureties on a sequestration bond, for wrongfully and maliciously suing out a writ of sequestration, under which fifty-two bales of cotton, the property of said estate, had been seized, on November 10, 1865, which was released April 4, 1866. Damages, actual and punitive, claimed at \$10,000.

The pleadings on the part of plaintiff, in addition to alleging special damage in the decreased price of the cotton, and expenses incurred to protect it against the unlawful seizure, also alleged that it was wrongfully and maliciously sued out, and punitive damages asked.

The defendants excepted to the petition, because of misjoinder of parties defendant, and because an action for punitive damages could not be maintained by the administratrix, and pleaded general denial; that the sequestration proceedings were had for the purpose of preventing injury by the acts of the administratrix, alleging ownership by Tomp-

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kins of the cotton; that the suit was not oppressive, and that no actual damages were suffered, &c.

On the trial, plaintiff gave in evidence the sequestration proceedings, bond, writ, and sheriff's return, showing the seizure of forty-one bales of cotton of five hundred pounds each. The sequestration suit was dismissed April 4, 1866. Mrs. Emily Toland, plaintiff, testified that the forty-one bales of cotton were seized in Washington county, in the fall of 1865, held a few days, when it was replevied by witness. It was worth twenty-eight to thirty cents a pound when seized. The cotton was not moved until in the summer of 1866, after the suit was dismissed; on account of water and bad roads, witness could not send the cotton to market for several weeks. Witness denied any contract for the sale of the cotton to Tompkins or Tompkins & Murphy. The cotton seized was the crop of 1862 and 1863. None of the crop of 1865 was seized, nor was any of the crop of that year interfered with. She was obliged to keep the cotton in the county while the suit was pending, in order to obtain sureties upon her replevin bond. The cotton, when sold, did not bring half its value when seized.

Cyrus Thompson, by depositions, testified: Cotton ranged in price throughout the month of November, 1865, as follows: At Galveston, ordinary, twenty-one to twenty-two cents, coin, per pound; good ordinary, from twenty-four to twenty-seven cents; low middling, twenty-seven to twenty-nine and a half; and middling, twenty-nine to thirty and a half cents. In December following, ordinary, nineteen to twenty-three cents; good ordinary, from twenty-three to twenty-six cents; low middling, twenty-five to twenty-eight cents; and middling, twenty-seven to thirty cents. In January, 1866, ordinary, twenty-two to twenty-six cents; good ordinary, from twenty-six to twenty-eight cents; low middling, twenty-eight to thirty and a half cents; and middling, thirty to thirty-two cents. In February, 1866, prices about as in January. In March, ordinary, twenty-three to twenty-

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five and a half cents; good ordinary, twenty-five to twenty-seven and a half cents; low middling twenty-seven and a half to twenty-nine and a half cents; and middling, twenty-nine to thirty-one and a half cents.

In April, from the 1st to about the 25th of the month, prices ranged, for ordinary, twenty to twenty-four cents; good ordinary, twenty-four to twenty-six cents; low middling, twenty-six to twenty-eight cents; and middling, twenty-eight to thirty cents—opening at the higher and closing at the lower figures. About the 25th April, 1866, or within a day or two thereafter, there began a rapid decline in prices—all grades decreasing about two cents per pound by the close of the month. The quotations are given in gold.

Witness also testified to the seizure, by sequestration in said suit, of eleven bales cotton in Galveston. He also testified that the delay in the sale of that lot did not occasion a loss by diminution of price. Witness was commission merchant, and the plaintiff shipped cotton by him.

Witness J. C. Wallace, by deposition, was asked, “what was cotton worth in November, 1865? what was it worth the following December, January, February, March, and April?” and answered: “Thirty to thirty-one cents per pound, in gold, and fifty-four cents per pound, currency, for good cotton. In the months of December, 1865, and January, February, March, and April, 1866, there was a decline of one to one and a half cents per pound specie per month; last of April, about twenty-six or twenty-seven cents specie for good cotton.”

Int. 3. “State whether a party would sustain any damage, and what, by the seizure and holding from market of eighty bales of cotton from November, 1865, to April, 1866.” To which he answered: “A party would sustain damage. The depreciation would be about \$22.50 per bale, specie, or about \$32.50, currency.”

For defense, Tompkins exhibited the claim of Tompkins & Murphy, against the estate of Joseph Toland, for a large

Argument for the defendants in error.

sum, and read the proceedings in the Probate Court, authorizing and approving a contract between Mrs. Emily Toland, administratrix of the estate, by which she was to deliver cotton raised on the plantation of the estate upon the debt. He also testified to a contract between himself and Mrs. Emily Toland, for the delivery to him of the crops of 1863 and 1864 upon the claim; that he took legal advice, and acted solely to secure his claim. The claim was compromised by the conveyance of a tract of land, and on that account the suit was dismissed.

The sheriff, M. A. Healy, who made the seizure of the cotton, testified that he had not moved it; that it received no injury while in his possession.

The jury found "for the plaintiff three thousand dollars, actual damage," upon which judgment was rendered against all the defendants. (Several of the sureties had died, and suit abated as to them.) Tompkins brought the case by writ of error to this court. The errors assigned were as follows:

"1. The court erred in not sustaining the pleas of defendants to the jurisdiction of the court.

"2. The court erred in not sustaining defendants' demurrers.

"3. The court erred in admitting illegal testimony.

"4. The court erred in its charge to the jury.

"5. The court erred in giving charges asked by plaintiff.

"6. The court erred in refusing charges asked by defendants.

"7. The verdict of the jury is contrary to law.

"8. The verdict of the jury is contrary to the evidence.

"9. The court refused to grant the defendants a new trial."

Breedlove & Ewing, and *P. H. & J. T. Swearingen*, for plaintiff in error.

Sayles & Bassett, for defendants in error, cited, *Dickinson*

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v. McGraw, 4 Rand., 150; *Herndon v. Forney*, 4 Ala., 243; *Smith v. Eakin*, 2 Sneed, 456; *Bruce v. Coleman*, 1 Handy, 515; *Churchill v. Abraham*, 22 Ill., 55; *Francis v. Northcote*, 6 Tex., 185; *Martel v. Martel*, 17 Tex., 391; *Ponton v. Belows*, 22 Tex., 681; *Crayton v. Munger*, 9 Tex., 285; *Hays v. Bonner*, 14 Tex., 631; *Albright v. Corley*, 40 Tex., 105; 40 Tex., 135; *Coburn v. Poe*, 40 Tex., 414; *Foster v. Champlin*, 29 Tex., 22; *Bernhard v. De Forrest*, 36 Tex., 518; *Allen v. Stephanes*, 18 Tex., 658; *Elliot v. Mitchell*, 28 Tex., 105; *Howard v. Colquhoun*, 28 Tex., 134; *Wright v. Hays*, 34 Tex., 253; *Benj. on Sales*, 664; *Drake on Attach.*, sec. 173; *McDonald v. Hewitt*, 15 Johns., 349; 2 Blackst. Comm., 443; 1 Com. on Con., 3; *Jackson v. Myers*, 3 Johns., 388; *Thornton v. Payne*, 5 Johns., 74; 10 Johns., 366.

MOORE, ASSOCIATE JUSTICE.—The court did not err in holding that the sureties in the sequestration bond might be joined in an action with the principal, for the recovery of damages for the wrongful suing out the writ, without a breach of the bond by the principal having been previously judicially ascertained. This construction of the obligation is believed to be to the advantage of the sureties as well as the obligee, and certainly the obligor has no good ground for objecting to it. The construction contended for by the plaintiff's counsel would occasion a circuitry of action, delaying and embarrassing the obligee in obtaining redress for the injury done him by the wrongful suing out of the writ, and would also subject the sureties to the costs of two suits instead of one, and to the possible damage of an excessive or improper judgment against the principal, by his collusion with the plaintiff, or his neglect to make a proper defense to the action.

The sureties have an immediate and direct interest in the amount of damages for which they are bound, in default of their principal, being properly ascertained. Therefore, upon principles of equity, they are proper parties to a suit by which

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this is to be done. And although we know of no case in which the precise question has been before this court, this is believed to be the construction which has been uniformly given to these and other similar bonds by the profession, and acted upon by the courts. (See *Portier v. Fernandez*, 35 Tex., 536; *Ponton v. Bellows*, 22 Tex., 681; *Martel v. Martel*, 17 Tex., 391; *Frances v. Northcote*, 6 Tex., 185.) A like ruling seems to have been made in other States on a precisely analogous question in reference to the liability of the sureties on attachment bonds. (*Herndon v. Forney*, 4 Ala., 243; *Churchill v. Abraham*, 22 Ill., 55.)

The demurrer to the petition was properly overruled. It is quite manifest that the suit was brought for damages alleged to have been sustained by the estate of Joseph Toland, deceased, by an unlawful seizure of property of said estate. It is true, there are in the original petition some allegations of personal wrongs and injuries to the administratrix, which seem to have been intended as matter of aggravation, which are not at all pertinent to the action for the injury to the estate; to which an exception, if taken, should have been sustained.

The objections to the evidence, shown by the bills of exception, are without force. That touching the validity of the sequestration bond for want of a scroll and seal, has been heretofore decided by this court, and must now be regarded as finally settled. The evidence of the witness Wallace though evidently not of so satisfactory a character if it stood alone, as it would have been if he had stated the market price of the cotton at the different periods to which his attention was addressed, it cannot be said that it is altogether inadmissible. Though the statement he makes is a conclusion, still it is a conclusion of facts which he may know and be able to testify to, just as readily and certainly as that the cotton was worth so much per pound on the days in question. The real objection, if there is any, to the evidence is rather to its proper weight with the jury than to its admissibility.

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By the next assignment of error, we are called upon to review the action of the court in overruling the motion for a new trial. An examination of the entire testimony which went to the jury, constrains us to say, that it is so manifestly insufficient to support the verdict, and the damages found by the jury are, in our opinion, so glaringly excessive, that we are forced to the conclusion, notwithstanding the very objectionable generality of the assignment, that this motion should have been sustained. The evidence, which was admitted over appellant's objection, shows a depreciation of only some thirteen or fourteen hundred dollars, in currency, in the value of the forty-one bales of cotton, which was prevented from being sold by the sequestration, from the time of its seizure to the dismissal of the suit; and the current price of cotton, during the time the suit was pending, testified to by the witness Thompson, shows that the depreciation was certainly no more. The witness Wallace, it is true, also states that the cotton, when levied upon, was worth \$250 a bale, and that the estate of Toland was damaged to the extent of one third of its value. Evidently, this statement can only be reconciled with his previous testimony, by supposing that he must have had reference in this part of his deposition to the price for which the cotton ultimately sold, some considerable time after the dismissal of the sequestration suit, and not to its depreciation while the suit was pending. Certainly, if the administratrix or her agents withheld the cotton from market after the dismissal of the suit, she cannot hold Tompkins responsible for the loss sustained by its subsequent decline in value. Nor can she justly attribute to him the damage resulting from the want of proper attention and care of the cotton, after she replevied it from the sheriff.

The other assignments of error are too general to require notice, unless it was plainly apparent that obvious injustice had been done plaintiff in error by the court, in some of the rulings thus complained of. As this is not manifestly the fact, we shall make no comment upon them.

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For the error of the court in overruling the motion for a new trial, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

J. M. TINSLEY v. W. C. BOYKIN.

1. **MECHANICS' LIEN—PROMISSORY NOTE—JUDGMENT.**—A judgment was rendered for a sum found to be due on one of two notes, the other not being due at the time of judgment, both of which, it was claimed, were secured by a mechanics' lien on a house and fifty acres of land, to be taken out of a larger tract, "in such shape as may be fair and equitable." The judgment was rendered for the note due, and it ordered sale of the house and forty acres of land, "to be taken out of defendant's tract in as near a square shape as it may be done"—the sale to be for enough cash to discharge the note due, and on a credit for the remainder, until the other note should become due; but "if the premises should not sell for a sufficient sum to pay the entire two notes, then the sheriff shall apportion the said purchase-money ratably between the note due," for which judgment was rendered, and the note not due, and the portion rated to the note due, and for which judgment was rendered, "shall be for cash, and the remainder on a credit." It also provided that for the postponed payment, the sheriff should take a lien on enough of the land sold to secure the deferred payment: *Held*—

1. Upon default of payment of the first of several notes secured by mortgage, suit could be maintained for a foreclosure of the mortgage to satisfy the first note, and for a sale of the entire mortgaged premises, if the land is not properly susceptible of division.

2. The decree in such a case should be so rendered as to make equitable provision for the payment of all of the notes embraced in the mortgage lien.

3. The decree should be so shaped, if the matter is not at once concluded by a rebatement of the interest on the notes not due, that the court should have control of the case and the title of the land until the notes secured by the mortgage lien are all satisfied. A judgment ordering a sale by the sheriff, and requiring him to take a lien on the land sold to secure a deferred payment, is error. If that practice were permitted, another suit to collect the purchaser's note would be necessary in case of default.

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4. The description of the land in the decree was defective, for want of certainty. The boundaries of the tract of which the sheriff was to place the purchaser in possession, should not be left to the sheriff, nor to adjustment between the purchaser and the owner of the remainder of the tract.

5. The evidence to establish a mechanics' lien (see Statement of the Case) was not presented in a way to conform to either of the modes of fixing a lien prescribed in the statute. (Paschal's Dig., arts. 7112, 7115.) The note sued on, executed after the work was finished, was not a contract for the building of a house. If regarded as a claim under a verbal contract, it was not sufficient to fix a lien, because it was not shown that a copy of it had been served on the defendant, as required by statute.

6. The provisions of the statute must be complied with substantially in every respect, in order to fix a mechanics' lien on the homestead.

APPEAL from Brazoria. Tried below before the Hon. A. P. McCormick.

Boykin brought suit, on the 25th of May, 1873, against Tinsley, on three notes: one for \$145, upon which he asked a judgment *in personam*; one for \$291.23, dated August 1, 1872, due one day after date; and one for \$497.42, dated August 1, 1872, and due February 1, 1874. The two last notes, he alleged, were secured by a mechanics' lien on the homestead of Tinsley, embracing fifty acres of land. He prayed for a judgment foreclosing his mechanics' lien on the dwelling-house and the fifty acres, and for a sale of the same, to satisfy the note for \$291.23. He claimed that his lien was "fixed" and established by a certain instrument in writing, which was attached as an exhibit, marked "A," to the petition. The exhibit is as follows:

"Exhibit A."

"1872. May 1. J. M. Tinsley, To W. C. Boykin, Dr.

"For labor and materials furnished in the erection of the dwelling-house in which said J. M. Tinsley now resides, which debt is liquidated and acknowledged by said Tinsley in the two notes hereto attached, dated the 1st day of August, 1872,

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which said notes were given by said Tinsley for said debt, and are, one for the sum of \$497.12, the other for the sum of \$291.23—\$788.35.”

Attached to this instrument was the following affidavit:

“Wm. C. Boykin, of the county of Brazoria, and State of Texas, being duly sworn, says that he is a mechanic, and that the said debt of the sum of seven hundred and eighty-eight dollars and thirty-five cents, as set forth in the above statement, and in the two notes therein mentioned and thereto attached, is justly due him, as a mechanic, for labor done and material furnished for the erection of a dwelling-house, in which said J. M. Tinsley now resides. Said labor was done and said material furnished under a verbal contract, between said Tinsley and the undersigned, during the latter part of the year 1871, and the first part of the year 1872; and the said debt for the same was due and payable on the 1st day of May, 1872. Said J. M. Tinsley, afterwards, to wit, on the 1st day of August, 1872, acknowledged and promised to pay said debt, and to that end executed his said two promissory notes for the same, which are hereto attached and made part of this statement. Said house is situate on the west bank of the Brazoria river, in said Brazoria county, and State of Texas, about six miles above the town of Columbia, on a part of the land originally constituting J. S. Tinsley's plantation tract; and to secure the payment of said two notes for the aggregate sum of seven hundred and eighty-eight dollars and thirty-five cents, as well as the interest on the same, I, the said Wm. C. Boykin, hereby claim a mechanics' lien upon the said house, and upon fifty acres of the tract of land on which the same is situated, including the site of said house, and said fifty acres to be taken out of said tract in such a shape as will be fair and equitable.

(Signed,)

“WM. C. BOYKIN.”

This instrument was sworn to by Boykin, and filed for record, with the district clerk of Brazoria county, on the 12th of August, 1872.

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The petition prayed for a sale of the land in accordance with the provisions contained in the exhibit.

On the trial, the following verdict was returned:

*“We, the jury, find for the plaintiff the following amounts:

One note, dated December 28, 1871,	-	-	\$165 96
One, secured by mechanics' lien,	-	-	333 45
One, not due, secured by lien	-	-	569 19

His

“THOMAS X WILLIAMS.”

mark.

On this verdict, a judgment was rendered for \$165.96, with interest from date of judgment, and for \$333.45, and to satisfy the judgment for the \$333.45, foreclosing “the mechanics' lien,” and ordering the dwelling-house and forty acres of land upon which it is situated to be sold by the sheriff as under execution, the forty acres to be taken out of defendant's tract in as near a square shape as the same may be done. The sale was, by the judgment, required to be for enough cash to satisfy the note due, and on a credit for the remainder until the 1st of February, 1874, when the last note became due. And it further provided, “and if the premises shall not sell for a sufficient sum to pay the entire two notes secured by said lien, then the sheriff shall apportion the said purchase-money ratably between the note now due, and for which judgment is here rendered, and the note not due, and the portion rated to the note due, and on which judgment is rendered, shall be for cash, and the remainder on a credit, with notes to be given the sheriff, with a lien on the land.”

*This verdict, it will be seen, was rendered in Brazoria county, in which the colored element largely preponderates. It is not strange that the edict of emancipation, and the national legislation growing out of it, should have resulted, in that county, in impaneling a jury, in which the foreman, after swearing to decide the case according to the law and evidence, was not able to read the law as it was contained in the judge's instructions, or to write his name to the verdict. Such a verdict can no longer jeopardize the security of life and property; the statute now makes an inability to read and write a cause of challenge.

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There is nothing in the record to explain why the judgment attempted to enforce payment by sale of forty acres, when the instrument relied on claimed fifty, (as copied in the record.)

The instructions were silent on the subject of mechanics' lien.

Thomas G. Masterson, for appellant.

George W. Duff, for appellee.

ROBERTS, CHIEF JUSTICE.—The judgment rendered is not authorized by the verdict. It is well settled, that when a mortgage is given to secure two or more notes, payable at different times, it may be foreclosed when there is a default in the payment of the note first due; and, in doing so, it is proper that the land mortgaged should, in accordance with the provision of our statute, be sold. The existence of the notes not then due should be averred, and their validity as a lien on the land established, in the suit for foreclosure, as was done in this case in the plaintiff's petition, in the proof on the trial, and in the verdict of the jury. Upon such verdict, a judgment and decree should be so rendered as to enable the court to keep the control of the case until the notes entitled to a lien should be provided for and satisfied, in a manner least prejudicial to all of the parties concerned. Where there could not be a division of the property, so as to sell it in separate parcels as the notes became due, then the entire interest in the mortgaged premises might be decreed to be sold, with a rebate of the interest on the notes not then due, or a decree might be made, disposing of the entire interest, partly for cash, to satisfy the note that was then due, and partly on a credit, to be paid as the other notes became due, the court holding the case open in the meantime until all of the notes were paid by the purchaser, and reserving from him a full title to the land until that was done, and

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until any surplus that might be left upon his bid was paid to the mortgagor.

Without prescribing in advance what decree should be rendered in any case, it may be safely laid down, that, 1st, upon the default of the payment of the first note, a suit may be maintained for the foreclosure of the mortgage, by the sale of the entire mortgaged premises, if the land is not properly susceptible of division; 2d, the decree should be so rendered as to make equitable provision for the payment of all of the notes embraced in the mortgage lien; and 3d, the decree should be so shaped, if the matter was not at once concluded by a rebatement of the interest on the notes not due, as that the court should have control of the case and the title of the land until the notes secured by the mortgage lien should be satisfied. (*Salmon v. Clagett*, 3 Bland's Ch. R., (Md.) 125; *Campbell v. Macomb*, 4 Johns. Ch. R., 534; *Brinckerhoff v. Thalhimer*, 2 Johns. Ch. R., 486; *Pepper v. Dunlap*, 16 La. R., 163; *Mussina v. Bartlett*, 8 Port., (Ala.) R., 277.)

The decree in this case required the land to be sold, partly for cash and partly on a credit, and that the purchaser should give notes to the sheriff, for the benefit of the person entitled to the one not due, with a lien upon the land, to secure the same when due, and to the defendant, the mortgagor, for any surplus of the bid. By this decree, if the purchaser should fail to pay the notes, another suit or suits would have to be brought by the parties entitled to the money, and their rights would be complicated with further litigation.

Another objection to the judgment is, that it is uncertain as to the land adjudged to be sold, described therein as follows: "The dwelling-house in which the said defendant, J. M. Tinsley, now resides, together with forty acres of the land on which the same is situated, said forty acres to be taken out of said defendant's said tract of land, in as near a square shape as the same may be done."

The petition should have stated such facts, in relation to

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the house on the tract, and the locality and shape of the tract, as would have enabled the court to have determined, upon such issues pertaining thereto as might have been made by the parties, the locality of the land decreed to be sold in connection with the house. This is especially important in this sort of a case, on account of the statute, applicable to a mechanic's lien upon a homestead, which requires the sheriff, ten days after selling it, to put the purchaser in possession of it. (Paschal's Dig., art. 7115.) The discretion of fixing the boundaries of the tract, of which the sheriff puts the purchaser in possession, should not be left to the sheriff, being a ministerial officer; and much less should it be left to the owner of the balance of the tract, and the purchaser, to settle the boundary lines, who would be almost certain not to settle it until another suit had been brought, and carried through the courts for that purpose. (*Walker v. Hallett*, 1 Ala., 391.)

The appellant contends that his offset should have been allowed. Upon what ground, does not well appear in the record; for he does not show any title to the claim that he sets up, even if it was not released, as contended for by the appellee. The jury did not notice it in their verdict, and we cannot say that they erred in that.

The plaintiff's right to a mechanic's lien upon the homestead, is the most important question in the case. It does not seem to have been contested in the court below. The evidence tending to establish it, was permitted to go before the jury without objection. As, however, it goes to the foundation of the action, so far as the lien is concerned, it is deemed proper to call attention to the fact, that the evidence of it is not presented in a way to conform to either of the modes of fixing a lien, as prescribed by our statute. (Paschal's Dig., arts. 7112, 7115.)

The statute prescribes, that a contract for building a house, furnishing materials, &c., when in writing, shall be recorded, and when made verbally, an account shall be made out, specifying the items thereof, according to the agreement, under

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oath, a copy thereof served on the party "owing the debt," and, in both cases, recorded within six months from the time that the debt becomes due, accompanied by a "description of the lands, lots, houses, and improvements against which the lien is claimed."

In this case, after the work was done, and materials furnished in building the house, under a verbal agreement, two notes were executed for the amount due therefor, in which the consideration is expressed to be for the materials furnished and the work done in building the house, the locality of which is defined by a very general designation. The question may well be asked, Is this a contract for the building of a house, and the furnishing the materials therefor, or is it an account, with a specification of the items, under a verbal contract? It is at most an acknowledgment, in writing, that there had been a house built and materials furnished, for which the plaintiff was entitled to receive the amount of the two notes given by the defendant. If it is regarded as a claim under a verbal contract, it was not shown that a copy of it was served upon the defendant, as required by the statute. In this connection, it may be remarked, that this is a statutory mode of fixing a lien upon a homestead, which may cause it to be sold, contrary to the ordinary rule, without the consent of the wife, given by an acknowledgment in due form, and therefore the provisions made to effectuate that object should be complied with substantially in every respect.

This view is taken here as the intimation of an opinion, rather than an authoritative decision, because the question seems not to have been raised in the District Court, and is not actually necessary to be determined now in this case, as it is now presented in the record.

REVERSED AND REMANDED.

Statement of the case.

JOSEPH LYNN AND WIFE ET AL V. EDWARD BUSBY.

1. CONSTRUCTION OF WILL.—B. died in 1862, leaving a will, in which he made his three children, his executors and equal heirs. He gave, however, to his son D. a negro, in addition to his otherwise equal share, to compensate him for maintaining E. B., a deaf brother of the testator. In the next clause of the will, he expressed the wish that his son D. would take especial care of E. B. during the latter's life; and if his son D. should die before his brother, E. B., he desired that his other two children, E. L. and M. D., should take charge of and provide for his brother, E. B., while he lived. The remaining clause of the will provided, "it is my wish that my homestead and five hundred and fifty-nine acres of land, with the improvements thereto attached, shall be set apart to my son D., extra of his interest in the remaining portion of my estate, in consideration of the landed interest already given to my other children, and as a compensation for maintaining of my brother E. B. as aforesaid." Suit was brought by E. B., for the rents and profits of the homestead, in which it was claimed that it was charged in the hands of the legatees with the support and maintenance of E. B., during his natural life: *Held*—

1. The will, properly construed, must be regarded as conveying the testator's desire for the maintenance and support of his brother E. B., as he had been previously provided for by the testator himself.

2. It was the intention, that E. B. should be provided for as a member of the family, without imposing a pecuniary burden on the heirs, in the shape of a charge or incumbrance on the estate, or of limiting the support of E. B. to any specific amount.

3. If E. B. left the homes of the heirs, provided for him in the will, without their fault, they would not become liable for an amount sufficient to support him elsewhere.

4. A judgment making an annual allowance of a stated sum of money for E. B. in the future, and giving him money for his estimated expenses in the past, while living away from the heirs, was erroneous.

APPEAL from Freestone. Tried below before the Hon. John B. Rector.

The former report of this case, with the opinion in 37 Tex., 146, with the opinion here published, will convey to the professional reader a proper understanding of the case.

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Likens & Stewart, for appellants, claimed, that if an implied trust was at any time created on behalf of E. B., it ceased the moment he, of his own accord changed his home and went to reside away from the heirs, citing Perry on Trusts, vol. 1, p. 117, sec. 113, and *Wilson v. Ball*, L. R., 4 ch. 581.

Thomas G. Jones, for appellee, cited Hill on Trustees, 4 Am. Ed., pp. 102, 110, 112, 115, 116, and notes.

ROBERTS, CHIEF JUSTICE.—When this case was before this court on appeal formerly, a construction was given to the will of appellee's brother, under which he claims a beneficial interest in a certain tract of land, to the extent of a support for himself during his life. (*Busby v. Lynch*, 37 Tex., 146. The court then held, that such portion of said tract of land as was over and above that part of it which was necessary to make the share of David Busby equal in value to the shares of each of his sisters, was, by the will of Milton Busby, charged with the support and maintenance of appellee Edward Busby. (Id.)

The District Court, afterwards, in following this construction, directed the ascertainment of the necessary facts by the jury, and decreed that an amount of the five hundred and fifty nine acres, equal in value to five eighths of the whole of it, should be charged and incumbered, so as to pay from the net proceeds of its rents and profits the sum of three hundred dollars annually for his support, and appointed a trustee to manage the said property, after it should be set apart by commissioners named for that purpose.

We are not disposed to unsettle the construction of the will, given to it by our predecessors in office, upon which this portion of the judgment and decree of the District Court is founded, in fixing and decreeing an apportionment of that part of the land which should be held charged with, and liable to, the necessary support of Edward Busby, and that which should not be so charged, it being a contingent incum-

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brance, as nearly equitable as could well be arrived at under the circumstances, in view of the objects of the will. To that extent alone was the opinion definite. The amount of interest to which the said Edward Busby was entitled, and the mode of realizing and disposing of it, were left to subsequent adjudication, which was thus indicated in the opinion of the court: "What that interest is, and what portion of that interest will be necessary for the care, support, and maintenance of Edward Busby, are facts which should be inquired into by the court, and determined from all the attendant and surrounding circumstances." The court below, in attempting to carry out this part of the opinion of the Supreme Court, (as we may suppose,) submitted certain issues of fact to the jury, and, upon their finding thereon, rendered a decree, in addition to that portion heretofore spoken of, as follows, to wit: "And the court being further of opinion, that the plaintiff (Edward Busby) is entitled to recover of the defendants the amount of his expense for support and maintenance, since the 18th day of September, 1868, to the date of this judgment and decree, it is therefore ordered, adjudged, and decreed that the plaintiff do have and recover of the defendant, the sum of one thousand seven hundred and seventy-one dollars and sixty-eight cents, with interest, at the rate of eight per cent. per annum, from date of this judgment, together with all costs of this suit, for which execution may issue."

It is obvious, from the recovery of the amount annually, in future, as well as of the gross amount for the past support, that the court below, on the last trial, in ascertaining the interest of Edward Busby, construed the will to give to him a fixed sum of money annually, to be determined by what should be found to be an adequate support and maintenance, to be paid to him out of the rents and profits of said land, whether he used or needed that amount for his support or not, and only that amount during any one year, whether he needed more than that for his support and maintenance or not. We do not understand that to have been the intention

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of the testator, in making a provision in his will for the care, support, and maintenance of his brother. In arriving at that intention, the general scope and objects of the will, as well as the attendant and surrounding circumstances, are proper subjects of examination. (*Hunt v. White*, 24 Tex., 643.)

Edward Busby was deaf and dumb, and had long lived with his brother Milton Busby, the testator, as a member of his family, and, although he was an able-bodied and intelligent man, ingenious in mechanism and industrious in his habits, it is not shown that he had ever sought to make and accumulate property, so as to make a provision for his own maintenance, in old age or in protracted sickness, or in any other misfortune or necessity.

Milton Busby had a minor son, David Busby, and two married daughters, when he made his will. He had previously given lands to his daughters, which the jury estimated to have been worth, at the time the will was made, \$3,000 each. He expressed his desire in his will, that his children should have equal portions of his property, except in respect to so much thereof as he deemed necessary to secure a support to his brother. To secure such provision, he gave to his son David his negro man Ralph, and also his homestead of five hundred and fifty-nine acres of land, estimated by the jury to have been worth, at the time of making the will, \$8,000. And he stated, in the sixth item of his will, that the devise of this land, which was so much more valuable than either of the tracts that had been previously given to his daughters, was "in consideration of the landed interest already given to my other children, Elizabeth Lynn and Malissa Davis," meaning to make his share of the land equal to each of theirs, "and as a compensation for sustaining and supporting my brother, Edward Busby, aforementioned." Thus it is seen, that a much larger share of the property, to wit, the slave Ralph and the excess in amount and value of the land, was given to his son, in order to have his brother amply provided for.

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The manner in which he was to be provided for was designed to be, as nearly as practicable, just as he had previously been provided for, which is evidenced by the third item of the will, as follows, to wit; "It is my wish, that my son David shall take especial charge of, maintain, and support my brother, Edward Busby, during his, the said Edward's, life; and should my son David die before my brother Edward, it is my wish that my other children, Elizabeth Lynn and Malissa Davis, shall take charge of and provide for my brother, Edward Busby, during his lifetime."

It is evident, that the main object for making the will at all was to provide for his brother a home with his children, as part of the family, and to so dispose of his property as to secure that object, without imposing a pecuniary burden upon them, and without his brother feeling it to be so. It never entered into the thought of the testator, in making this will, to fasten upon the estate devised to his son a charge or incumbrance of a particular amount of money annually, or of limiting the support of his brother to a particular amount of money. Had such been the provision designed, it would have been in the nature of an annuity, to be paid to his brother, which might be disposed of by him for other purposes than a support, if not needed for that, or which would have to answer for a support, however much more might be needed, in case he was overtaken by sickness, or permanent disease, or other infirmity, which might swell his necessary support to more than that amount during one year.

If Edward Busby has left the homes of those children of Milton Busby and made a support for himself, or has been supported by some one else, that is a state of case not anticipated, and provided for in the will. His leaving without their fault would not render them liable for an amount that might be estimated to be sufficient to support him in the homes of other people. Here is a bounty provided for him, with its mode of enjoyment prescribed in the will. He is of lawful age, and of sound mind, and under no legal restraint,

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and can accept it or not, as he pleases. There are no facts shown, establishing a good ground for his not accepting it upon the terms and in the mode prescribed in the will. There is no evidence that he was not well treated, and properly supported, by those intrusted with that duty. If there should ever be any good equitable grounds for intrusting him to the care of other persons, or of making any other provisions than such as have been provided expressly in the will, then it will be time enough to determine what, if any, provision can be made for him, variant from that expressed in the will. Under the facts of the case, as presented in the record, we are of opinion that the judgment of the court, in making an annual allowance of a stated sum of money for the future, and in giving him a large sum of money for his estimated expenditure in supporting himself in the past, is erroneous.

The judgment is reversed and cause remanded.

REVERSED AND REMANDED.

EXECUTRIX OF W. W. BROWNING *v.* J. ATKINSON.

1. **DIVIDING LINE.**—A dividing line fairly agreed upon, and marked out by the owners of adjoining tracts of land, will be conclusive upon both, and those claiming under them, as to the true locality of their dividing line, though it may subsequently, after long acquiescence, be ascertained to vary from the course called for in the deeds, under which the parties claimed prior to agreeing upon the line; and the rule is the same, whether the marked line be recognized and called for in a deed, or whether it be subsequently marked and established by the parties.
2. **DIVIDING LINE — LONG ACQUIESCENCE.**—A marked divisional line, found upon the ground in 1838, recognized as the divisional line by the original claimants of the adjacent tracts, and afterwards, for a series of years, by those claiming under them, though it may vary ten degrees, in a part of its length, from the course called for

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in the deed, could not be regarded as having been established in error, in a suit begun in 1862, and could not at that late day be corrected.

3. **PRACTICE—INTERVENOR.**—A plaintiff who sues for land, the title to which is in an intervenor in the same suit, is not entitled to recover by reason of the fact that the petition of intervention united with plaintiff in the prayer, that title to the land might be decreed in plaintiff. No such effect can be given to such a plea; suits must be brought in the name of the party legally or equitably entitled.

APPEAL from Washington. Tried below before the Hon. I. B. McFarland.

This suit, brought in 1862 by W. W. Browning, was before the Supreme Court at a former term. (37 Tex., 633.) A full statement of the pleadings and testimony is not deemed material to an understanding of the opinion.

In 1834, one Stephens sold to Elisha Roberts one third of a league of land, a portion of which is the land claimed by plaintiff. Afterwards, Stephens conveyed to different parties the rest of the league. The defendant, through mesne conveyances, had acquired, in 1857, title to a part of the rest of the league so conveyed by Stephens, and the controversy was as to the dividing line, plaintiff insisting that its locality must be ascertained by following the calls in the conveyance of title, and the defendant insisting that there was a plainly-marked line on the ground, which, though not agreeing with the calls in the title, was still the western boundary of the Roberts survey. The marked line was first seen in 1838, and though there appears to have been no witness who saw it run, there was testimony to the effect that it was recognized and known in the neighborhood as the dividing line between the land conveyed to Roberts and the remaining portion of the league, and seems, inferentially, to have been so treated by the former owners.

The title papers offered in evidence by plaintiff failed to show a conveyance to plaintiff of the strip in controversy between the marked line and the line as run by following course and distance, but showed that the title was in the inter-

Argument for the appellant.

venors, if in either. The intervenors, in February, 1871, filed their plea of intervention, as follows:

"W. W. Browning <i>v.</i> Jethro Atkinson.	}	3178.	Suit pending in District Court of Washington county.
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"And now comes James Daughtry, Edward Daughtry, and Josiah Daughtry, and Lenora Ross, who is joined by her husband, G. T. Ross, all residents of the county of Austin, in the State of Texas, and, under leave of the court, intervene in the above-entitled cause, and unite in the allegations, and in the prayer of the plaintiff's original and amended petition.

(Signed)

"SAYLES & BASSETT,
For Intervenors."

A jury was waived, and judgment rendered for the defendant, for costs, and establishing the divisional line between plaintiff and defendant, (describing it,) as claimed by defendant. No action regarding an appeal was taken by intervenors.

The case was argued with much ability on each side, but in view of the opinion, a full statement of the facts seems unnecessary.

Sayles & Bassett, for appellant, on the proposition that a call for a line marked will not control course and distance, cited *Houston v. Pillow*, 1 Yerg. R., 488; *Martin v. Vance*, 3 Head, (Tenn.) 649; *Borman v. Cox, Peck*, (Tenn.) 364; *Jordan v. Payne, Id.*, 320. And it is only where lines are actually marked, that a call for them will control course and distance. (1 Dev. & Bat., 427; 14 Penn. St., 59; 6 Peters, 508; 4 Wheat., 444; 4 Cond. R., 501; 1 Bibb, 467; 4 McLean, 279; 1 Hayn, 22, 238, 376; 4 Serg. & R., 461; 12 Penn. St. R., 180.)

They also cited *McCown v. Hill*, 26 Tex., 359; *Booth v. Strippleman*, 26 Tex., 440; *Hubert v. Bartlett*, 9 Tex., 103; *Anderson v. Stamps*, 19 Tex., 464; *Chinoweth v. Haskell*, 3

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Peters, 96; Preston v. Bowmar, 2 Bibb, 493; Shipp v. Miller, 2 Wheat., 316; (4 Cond., 135.)

We omit an exhaustive supplemental brief of appellant, devoted chiefly to a discussion of the doctrine of estoppel.

Breedlove & Ewing, for appellee, argued at length the facts of the case, and cited, as applicable to them, the following authorities: Hubert v. Bartlett, 9 Tex., 97, and 21 Tex., 20; Bolton v. Lann, 16 Tex., 96; George v. Thomas, 16 Tex., 74; Booth v. Upshur, 26 Tex., 70; Booth v. Strippleman, 26 Tex., 441; Stafford v. King, 30 Tex., 271.

They also insisted that unless the judgment was without evidence to support it, the court should not interfere with it; citing Bailey v. White, 13 Tex., 118; Gilliard v. Chessney, 13 Tex., 337; McFarland v. Hall, 17 Tex., 690.

GOULD, ASSOCIATE JUSTICE.—Appellant contends that course and distance are the controlling, and indeed, the only calls in the deed from Stevens to Roberts, and that to justify the adoption of a line varying from those calls, the evidence should show conclusively that the line adopted was not merely “reputed to be, but in fact was, the very line run and marked at the time” the deed was made. But certainly it is competent for the owners of contiguous lands to settle the line of division between them; and if Stevens and Roberts, after the deed was made, and at a time when the land was theirs, fairly agreed upon and marked out their dividing line, though that line be subsequently, after long acquiescence, ascertained to vary somewhat from the course of the deed, it will be conclusive upon them and those claiming under them. In the case of *George v. Thomas*, 16 Tex., 88, Justice Wheeler, delivering the opinion of the court, and speaking of the necessity of following the lines actually marked, as far as practicable, says: “And the rule is the same, whether the deed or conveyance refer for its boundaries to the marked lines or monuments, or they be afterwards

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marked or established by the parties." (*Waterman v. Johnson*, 13 Pick., 267; *Makepeace v. Bancroft*, 12 Mass., 469; *Davis v. Rainsford*, 17 Mass., 212; *Rockwell v. Adams*, 6 Wend., 468; 7 Cowen, 761; *Kellogg v. Smith*, 7 Cush., 382; *Lerned v. Morrill*, 2 N. H., 198; *Stone v. Clark*, 1 Met., 378; 2 Wash. on Real Prop., 676, 2d ed; 1 Greenl. Ev., Redf. ed, sec. 301, note 2.)

In regard to the character of evidence necessary in cases like the present, it has been said that "acquiescence for a long time is evidence of an agreement to the lines." (*Rockwell v. Adams*, 6 Wend., 468.) In that case, Chief Justice Savage gives the following extract from the opinion of Justice Van Ness, in *Jackson v. Ogden*, 7 Johns., 245, as stating the rule of law correctly: "When two persons, already having a title, have settled the line of division between them, or where one having title has made an actual location, according to what he supposed to be his true line, and his neighbors have acquiesced in such location for a considerable length of time, the boundary thus established shall remain undisturbed." In the case of *Bolton v. Lann*, 16 Tex., 113, Justice Wheeler says: "It may be observed, however, that the acquiescence of the proprietors of adjoining lands is not unfrequently referred to and received as evidence to determine their boundaries. Prior possession is notice of the claim of the person in possession, to the purchaser of adjoining lands, and the case ought to be one of very clear right to warrant such purchaser in disturbing the boundaries adopted by the former proprietors, as evidenced by their express or tacit consent." Were it necessary, in order to dispose of the case to do so, we should hold that, under the evidence, the court might well have found that Roberts and Stevens had established the marked line as their division line; that this line had been acquiesced in for a series of years by those claiming under them, and that, notwithstanding the fact that this marked line, in a part of its length, varies, perhaps, as much as ten degrees from the course called for, the error is not such as can be

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corrected at this late day. But we are of the opinion that the plaintiff has failed to show title to the land which he claims. The field-notes of the land given in the deeds to Browning, from the heirs of Anna Daughtry, and the testimony of the surveyor who made the partition between those heirs, make it plain that the land actually divided and actually conveyed by them did not include the strip of land in controversy. Clearly, the plaintiff failed to show title to the contested strip of land, unless the plea of intervention of Browning's vendors was sufficient to operate a conveyance of their rights. We know of no authority for giving such effect to that plea. Suits for land should be brought in the name of the party who has the legal or equitable title thereto, and the plaintiff in this case has failed to show title, either legal or equitable, to the land really in controversy. So far as the record shows, plaintiff is in possession of all the land to which her testator, Browning, acquired any right by the conveyances from the heirs of Anna Daughtry. This is a sufficient answer to his demand, without looking further. The judgment is accordingly affirmed.

AFFIRMED.

F. HICKCOCK'S SONS ET AL. v. JANE F. BELL.

WRIT OF ERROR BOND—BANKRUPTCY—AFFIRMANCE ON CERTIFICATE.—A citation in error was served, on the 18th day of October, 1876; the plaintiffs in error were adjudged bankrupts, on the 18th of January, 1877; the transcript not being filed, a judgment of affirmance was rendered, on certificate, on February 13, 1877, on motion of defendant in error, made January 30, 1877; the assignment of causes, to which the writ of error was returnable, began on the 29th of January, 1877; an assignee of bankruptcy of plaintiffs in error was appointed February 17, 1877. On the 16th of March, 1877, a motion was filed by the sureties of the plaintiffs in error on

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their error bond alone, to set aside the judgment of affirmance, upon the ground that their principals had been adjudged bankrupts after the citation in error had been served, and before the judgment of affirmance was rendered: *Held*—

1. In order to suspend the enforcement of a judgment in the District Court until it can be examined in the Supreme Court, the sureties upon the writ of error bond, in effect, under the statutes of Texas, make themselves parties, jointly with the plaintiff in error, and liable to a judgment against them, in conjunction with the plaintiff in error, for the amount that may be adjudged against him in the Supreme Court.

2. The writ of error bond, required by statutes, (Paschal's Dig., art. 1495.) has, by its terms, the force of a judgment against the sureties, and when, on it, a judgment is rendered, in the Supreme Court, against the sureties, it relates back and operates as a lien upon the land of all the obligors from the date of the bond, as any other judgment would, of that date.

3. The permission given the sureties, by statute, (Paschal's Dig., art. 4625.) to institute proceedings within one year from the forfeiture of the bond, for any cause that should defeat or modify a recovery on the bond, does not relate to a motion in the Supreme Court alone, but was designed to embrace any suit or proceeding that might be necessary.

4. That a person adjudged bankrupt is *civiliter mortuus*, is true, only in a qualified sense. Until an assignee is appointed to represent him, he may do whatever is necessary to protect his interest in a suit then pending.

5. Had the plaintiffs in error, or the sureties, filed a transcript of the record at the proper time, and, on a suggestion of bankruptcy made, shown that the plaintiffs in error had been adjudged bankrupts, the trial of the cause would have proceeded to judgment against the sureties, if no error was found in the record, and further proceedings would have been stayed against the bankrupts alone.

6. Bankruptcy confers a personal privilege; the suggestion of bankruptcy is one to be made by the bankrupt, and the bankrupts in this case, not having appeared and asked to set aside the judgment rendered as against them, no stay of proceedings against them will be ordered.

7. According to the laws of this State, a judgment was legally rendered against the plaintiffs in error, without violating any provision of the Federal bankrupt law; the rendition of said judgment works a forfeiture of the writ of error bond, and gives it the force and effect of a judgment against the sureties who filed the motion.

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ERROR from Galveston county, upon a certificate.

The character of the motion to set aside the judgment rendered in this case is stated in the opinion.

No briefs of counsel on either side have been received by the reporters.

ROBERTS, CHIEF JUSTICE.—This is a motion by the sureties of plaintiffs in error, upon their error bond, to set aside the judgment of affirmance rendered at this term, upon a certificate, upon the ground that their principals had been adjudged bankrupts after the citation in error had been served, and before said judgment of affirmance was rendered.

The citation in error was served on the 18th of October, 1876. The plaintiffs in error were adjudged bankrupts, as appears by certificate of the clerk of the District Court of the United States at Galveston, on the 18th of January, 1877. The transcript in said cause not having been filed, a judgment of affirmance, upon certificate, was rendered on the 13th of February, 1877, upon motion of defendant in error, made on the 30th of January, 1877.

The assignment of causes of this term, to which said writ of error was returnable, commenced on the 29th of January, 1877. The assignee in bankruptcy of plaintiffs in error was appointed on the 17th day of February, 1877.

This motion was filed on the 16th of March, 1877, and in support of it the position is assumed in argument, that, if it had come to the knowledge of this court before the judgment of affirmance was rendered, as it is now made known, upon the application of the sureties, by the certificate of the clerk of the District Court of the United States at Galveston, that plaintiffs in error had been adjudged bankrupts, the judgment of affirmance upon the certificate would not have been rendered, and that, therefore, upon this motion made by the sureties alone at the same term by the sureties the judgment should be set aside as to them.

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We are not prepared to sanction this proposition. The object of a writ of error is to show that there have been such errors in the proceedings of the District Court in the trial of the cause, as that the judgment rendered therein should not be enforced. In order to suspend its enforcement until it can be examined in the Supreme Court, the sureties upon the writ of error bond, in effect, under our statute, make themselves parties jointly with the plaintiff in error, and liable to a judgment against them in conjunction with the plaintiff in error, for the amount that may be adjudged against him in the Supreme Court.

A writ of error is treated in this State as a continuation of and as one of the modes of continuing the proceedings in a suit, in which a final judgment has been rendered, similar to the proceeding by appeal, and not a new suit. To supersede the judgment therein rendered in the District Court, the plaintiff in error is required to give his "obligation, with good and sufficient security, to be approved by the clerk, payable to the adverse party, in a sum equal to double the value or amount of the judgment, order, or decree, upon which the writ of error is obtained, conditioned that the party obtaining such writ shall comply with the judgment, order, or decree of the Supreme Court upon such writ, and well and truly pay all such damages as may be awarded against him; which bond shall have the force and effect of a judgment against all the obligors, upon which execution may issue, in case of forfeiture." (Paschal's Dig., art. 1495.)

The legal effect of a bond, which is declared by statute to have the force and effect of a judgment, has often been decided by this court to bind the sureties on the bond, as co-obligors with the plaintiff in error, and liable to have judgment rendered against them by the Supreme Court, when the cause is adjudged against him; and when so rendered, it relates back and operates as a lien upon the land of all the obligors from the date of the bond, the same as any other judgment of that date. This judgment is rendered in the

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Supreme Court against the obligors in the bond, without any further notice to the sureties, than that which they have by entering themselves as parties in the proceedings in the act of executing the bond.

Lest there should some injustice result from this course of proceeding, it is provided by our statute, that "the obligors, or any one or more of them, whose name or names appear to any statutory bond, concerning which it is or shall be provided by law, that it is to be or shall become a judgment, or have the effect thereof, shall have one year, next after the actual or ostensible forfeiture of the same, to move the proper court to quash said bond, or otherwise to move for and have an issue or issues, and a jury to try the same, or any other matter of fact which, on a regular action on such bond, might properly defeat or modify a recovery thereon against such obligor or obligors." (Paschal's Dig., art. 4625.)

These two statutes have been considered together, and the latter has been regarded as furnishing remedies in which issues of law may be presented to the court, or issues of fact may be tried by a jury, in order to correct any error or injustice that may have been committed, to the prejudice of the obligors, in the rendition of the judgment under the former statute. It has been held that said remedies are not confined to a mere motion in the Supreme Court, but although a motion is mentioned, it was evidently designed to embrace any suit or proceeding that might be necessary under the circumstances of the case.

In support of the views here presented in the construction of these statutes, and the effect given to such bonds, in reference to the legal obligation of sureties thereon, the following decisions of this court may be referred to: *Janes v. Reynolds*, 2 Tex., 251, 255; *Perry v. Gregory et al.*, 13 Tex., 328; *Robertson v. Morer*, 25 Tex., 442; *Berry v. Shuler*, 25 Tex. Supp., 140. The same effect is given by statute to sequestration bonds and injunction bonds, but not to attachment bonds, replevy bonds, and claim bonds, which are given to secure

the redelivery of property, and are not declared to have the force and effect of a judgment. (Paschal's Dig., arts. 150, 3778, 3779, 3936, 3938, 5100, 5101; Testard v. Neilson, 20 Tex., 139.)

The ground upon which it is contended that this motion should prevail is, not because there is anything apparent in the record that vitiates the judgment which has been rendered in the Supreme Court, but because of the extraneous fact, that the original defendants in the District Court, the plaintiffs in error, were adjudged bankrupts after the writ of error had been taken and the citation therein served, and before the return day of said writ, and before said judgment was rendered in the Supreme Court against them and their sureties on the writ of error bond. That persons adjudged bankrupts are dead in law, (*civiliter mortuus*.) is true only in a qualified sense. Until an assignee is appointed to represent them, they may do what may be necessary to protect their interests in a suit then pending, in whatever stage it may be. "The bankrupt may continue to prosecute a pending action until the assignee is appointed and an assignment made to him, for he holds the title, and there is no one to take his place until that time." (Bump, 7th ed., 128, citing Sutherland v. Davis, 42 Ind., 26.)

The plaintiffs in error could have procured and filed a transcript of the record at the proper time in the Supreme Court, and they should have done so if they desired to have the judgment against them reversed. And so should the sureties have had it filed, if they desired to be relieved from their joint responsibility as obligors in the writ of error bond.

Had they filed the transcript, and had the plaintiff in error appeared and moved for a stay in the proceedings, upon a suggestion of their bankruptcy, supported by the evidence of the adjudication such as that which was produced on the hearing of this motion, the question would have been then presented, whether the obligors in the bond for writ of error occupied the position, under our statute, of joint com-

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tractors, subject only to the condition that there should be found no error in the judgment of the District Court; and upon it being determined that such is their position, the trial of the cause would have proceeded to judgment against the obligors in the Supreme Court, if no error was found in the record, and further proceeding might have been stayed against the bankrupts, but not against the others, to await his effort to obtain a discharge of his liability on the joint obligation. (Bump, 7th ed., 164, 600, and cases cited; *Tinkurs v. O'Neal*, 5 Nev., 93.)

"Proceedings in the Appellate Court will not be stayed when the defendant appeals, and then becomes bankrupt." (Bump, 7th ed., notes, 603, citing 39 Cal., 559.)

The defendant in error had a right to procure and file a transcript of the record at the time the writ of error was returnable, and it would have stood as a case regularly in the Supreme Court, if there was a failure on the part of the plaintiffs in error to file it. The court could have proceeded to adjudge the case on that transcript, the same as if it had been filed by the plaintiffs in error. Neither party having filed the transcript of the record at the proper time, the defendant in error still had the right to procure and file, at the same term in the Supreme Court, a certificate under the statute, and ask an affirmance of the judgment, without reference to the merits; and the certificate being accompanied by a copy of the writ of error bond, judgment must have been rendered against all of the obligors in the bond. (Paschal's Dig., art. 1589.) The certificate being regular in form and substance, the court would have rendered a judgment against the obligors in the bond, although the plaintiffs in error had appeared and suggested their bankruptcy; and the most that they could have required, would have been to have execution stayed as to them, to await their endeavor to procure a discharge in bankruptcy. It does not follow, however, that the sureties on the bond could have procured the stay for themselves, for they were responsible for the amount of the judgment, should

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it be affirmed, as joint obligors, according to the construction placed upon the law under which the bond was given. They had no right to procure the stay for the plaintiffs in error, because bankruptcy confers a personal privilege, of which the party so adjudged can avail himself or not, at his own discretion, either in procuring a stay of proceedings against him, or a discharge from liability.

It has been held, that "the suggestion of bankruptcy is one to be made by the bankrupt." The continuance by the bankrupt law is to be granted "upon the application of the bankrupt." (Bump, note 601, citing *Palmer v. Merrill*, 57 Me., 26.)

"It is not the duty of the court to stay proceedings, upon being advised that the debtor has filed his petition in bankruptcy, whether asked to do so or not." (*Id.*, 602, citing *Dunbar v. Baker*, 104 Mass., 211; sec. 5106 of the Bankrupt Law.)

Notwithstanding the defendant's bankruptcy, a valid judgment can be rendered against him, unless he avails himself of the proceedings in bankruptcy. (26 Me., 57.)

The operation of the bankrupt law is, not to render illegal such proceedings in the State courts as are necessary to obtain a judgment, when not resisted by the party adjudged a bankrupt, but to render illegal any interference by legal process from State courts, with the property properly assigned or assignable, and therefore, under the charge of the bankrupt court for disposition, according to the terms of the bankrupt law. (Bump, 7th ed., 188-190.)

In this case, the plaintiffs in error did not appear and object to the judgment as rendered, nor have they appeared in this motion to set it aside, and therefore no stay of further proceedings against them, under the judgment, should be ordered. Should an execution issue upon the judgment that has been rendered, and should any of their property be levied on, that has been or may be assigned, that will present a different question, not necessary to be decided by this court.

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It is only necessary now for this court to determine on this motion, that, according to the laws of this State, a judgment has been legally rendered against the plaintiffs in error, without violating any provision of the bankrupt law of the United States, and that the rendition of such judgment against them, as, it has been held by this court, works a forfeiture of the writ of error bond, and gives it the force and effect of a judgment, as it is entered in this case against the sureties, who have made this motion.

"The judgment of this court, affirming the judgment of the District Court, is the declaration of the forfeiture of the bond." (*Robertson v. Moorer*, 25 Tex., 442.)

The motion is overruled.

MOTION OVERRULED.

J. H. SIMPSON v. MARGARET FOSTER.

1. AMENDMENT—PLEADING.—The right to amend pleading is limited, as to the answer, by the rule that the defense must be filed in due order of pleading.
2. SAME—DUE ORDER OF PLEADING.—Where a plea has been inadvertently filed, and it thereby cuts off a substantial defense, the court should, on proper application, allow such plea to be withdrawn, to enable the defendant to plead his several defenses in due order of pleading.
3. PARTIES—LEGAL TITLE.—Where suit was brought by the legal owner of a promissory note, executed for the purchase-money of a tract of land, the legal title to which was in the vendor, in trust, the defendant cannot plead in abatement the non-joinder of those equitably interested in the purchase-money for which the note was given.
4. TENDER OF CONFEDERATE MONEY.—A tender of Confederate money will not affect the liability of the maker of a note, whether made to an agent or to the holder of the same.
5. CONFISCATION LAWS.—Nor will a non-resident owner of a promissory note be in any way liable for loss resulting to the maker of such note from the agent of the owner turning the note over to the Confederate States receiver, under the laws of the Confederate States during the war.

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6. FOREIGN ADMINISTRATION.—A foreign executor or administrator cannot maintain a suit in this State, in virtue of his foreign letters testamentary or of administration.
7. SAME—PERSONAL PROPERTY.—A legatee, under a foreign administration, admitted to the ownership of personal property, may afterwards sue here in his own name for the property without the probate of the will.
8. SAME.—The fact that the will makes the executor sole legatee upon trusts declared, will not authorize suit to be brought by such foreign executor.
9. SAME.—Such executor could not execute a deed to pass land of the estate in Texas without probating the will in this State.

APPEAL from Lafayette. Tried below before the Hon. I. B. McFarland.

On September 6, 1854, G. T. Holman and others conveyed to Thomas S. Foster, by deed, seven hundred acres of land in Fayette county, Texas, and on October 3, 1854, Foster executed to Fred Tate a power of attorney to sell the land. By virtue of this power, Tate executed to Robert A. Ishe and J. H. Simpson a bond for title to said land, on February 4, 1860. The consideration for the land was \$150 cash, and three notes of Ishe and Simpson, the first for \$2,183.83, due in four months, the second for \$2,333.33, due in twelve months, and the third for \$2,333.33, due in two years, all bearing ten per cent. interest from date, and each of them being made payable to Fred Tate, at his office in La Grange, Texas.

The first note having been paid, and Thomas S. Foster having died at St. Johns, Florida, on June 16, 1866, Margaret S. Foster instituted this suit in the District Court of Fayette county, on February 26, 1873. In her petition, she alleged, in substance, that she was the widow of said Foster; that he had bequeathed to her, by will, "all his property—real, personal, and mixed"—and that she was his "sole legatee," and, as such, owns the two last-mentioned notes, upon which she brought suit. She averred her power and readiness to make a deed to the land, and carry out the provisions of said

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title bond, upon the payment of the balance of the purchase-money, etc. She also alleged that Robert A. Ishe was dead, and his heirs unknown, and asked for judgment for the money due on said unpaid notes, with foreclosure of vendors' lien on said land, with order of sale, etc.

At the return term, the appellant, Simpson, filed a general demurrer and general denial, and on November 23, 1874, he filed a plea in abatement and amended answer, in which he alleged that the case could not proceed for want of proper parties; that Thomas S. Foster only held the legal title to said tract of land in trust for the mercantile firm of Barkroft & Co., of the city and county of Philadelphia, and State of Pennsylvania, and that the names and present residences of the members of said firm were not known to defendant, but were well known to the plaintiff. Further answering, that he had paid the first of said notes at its maturity, and that on the — day of —, 1861, he had brought the money to La Grange, to pay the second of said notes, (the third not being then due,) and tendered the same to said Fred Tate, and that Tate refused to receive it, and informed Simpson that he had turned over the two notes sued upon in this action, to the receiver of the Confederate States. He further charged that Fred Tate, the agent of the said Thomas S. Foster, did, on the — day of —, 1861, wrongfully turn over both of said notes to the receiver of the Confederate States; and that by this wrongful act of Tate, the defendant, Simpson, was compelled to pay to the authorities of the Confederate States, in the year 1863, the principal and interest then due on said two promissory notes, amounting to the sum of \$5,366.66, in Confederate States treasury notes, and that said sum of Confederate money was then worth the sum of \$3,000 lawful money of the United States, which last-mentioned sum he plead in offset and re-convention.

This cause was tried in the court below, on November 25, 1874. The motion of plaintiff to strike out the plea in abate-

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ment and amended answer, was sustained, and the ruling excepted to; the verdict and judgment being in favor of plaintiff, and a new trial refused, Simpson appealed.

The additional facts necessary are in the opinion.

Tinmons & Brown, for appellant, cited Story on Ag., sec. 452; *Wright v. Calhoun*, 19 Tex., 421; *Paschal's Dig.*, arts. 3709, 3710; *Paschal v. Achlin*, 27 Tex., 173; *Johnson v. Brown*, 25 Tex. Supp., 126; *Jones v. Taylor*, 7 Tex., 240; *Cooper v. Singleton*, 19 Tex., 260; *Demaret v. Bennett*, 29 Tex., 262.

Moore & Ledbetter, for appellees.

MOORE, ASSOCIATE JUSTICE.—The 34th section of the act to organize the District Courts (*Paschal's Dig.*, art. 54) does not give parties an absolute and unconditional right to amend their pleadings at any time before they announce themselves ready for trial. The amendment must not only be made under the direction of the court, and upon such terms as it may present, but the right or privilege of thus amending cannot be exercised in direct conflict with other plain provisions of the same act. (*Paschal's Dig.*, art. 144.) The right to amend the pleadings is conferred in no more positive or plainer terms, than are defendants', who plead several matters for their defense, required to file their pleas at the same time, and in due order of pleading. While our statute allowing amendments is certainly unusually liberal—so much so that, counsel say, it “was no doubt designed to do away with much of the nonsense and ‘due order’ of the technical pleading”—it certainly cannot be held that a party is entitled, as matter of right, to file his defense, except in the due order of pleading. Unquestionably, if a plea had been inadvertently filed, and thereby cut off a substantial ground of defense, the court might and should, on a proper application, permit such plea to be withdrawn, to enable the defendant to plead his several defenses in the due order of pleading;

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and, if the court allowed an amendment to be filed out of the due order, without the previous pleas having been withdrawn, although irregular, it might not be a material error, for which the judgment should be reversed.

Aside, however, from the objection to the time and manner of filing the plea in abatement, appellant has no cause to complain of the action of the court in reference to it. The matters stated were altogether irrelevant to the case before the court. The plea does not deny, but, on the contrary, directly avers, that the legal title to the land, was in Foster when appellant purchased. And it is not pretended that the legal title had become vested in any way in these alleged *cestui's que trust*, who, it is claimed, should have been made parties. If appellant had performed his part of the contract and gotten a deed from Foster before his death, it would certainly have been unnecessary for the parties having, as it is insisted, an equitable interest in the money for which it was sold, to have joined in the deed, in order to perfect title. If the legal title was conveyed to Foster with their consent, to enable him to control and sell the land, and he made a *bona fide* sale of it, unquestionably the parties interested with him, and at whose instance this was done, could look only to him or his heirs and legal representatives for their interest, and not to his vendee.

The exceptions to so much of the amended answer as alleges a tender of Confederate treasury notes to Tate, the payee of the notes, (who, as appellant well knew, was the mere trustee of Foster,) and as such sets up claim for damages, by reason of the surrender of the notes by Tate to the Confederate States receiver, were properly sustained. These defenses were altogether frivolous. Confederate treasury notes were not a legal tender in payment of debts. If the notes had been payable to Tate in his own right, instead of as an agent, it is unnecessary for us to say he might have refused to receive them, if he thought fit to do so. And if appellant ever paid the principal of the notes to the Confederate States

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receiver, it was entirely voluntary, as he was only required by the confiscation acts of the Confederate States to pay the interest. Appellant does not insist that the payment of the notes to the receiver was a discharge or satisfaction of the debt. And certainly it cannot be even plausibly claimed that this has been indirectly done, by holding the non-resident creditor responsible in damages to the amount so paid, because of the obedience of his agent to the law, to which both he and the debtor were, at the time, alike amenable.

There is, however, another ground of error, apparent in the record, of an altogether different character, for which the judgment must be reversed. The notes sued upon were payable to Tate, and though, as is alleged by appellee, they belonged to Foster, he would, ordinarily, have been required to bring suit upon the notes merely in Tate's name, for his use. Upon averment and proof of his equitable right to the notes, and especially in connection with the absence of Tate from the country, or his death, &c., he could, under our blended system of law and equity, have brought his action in his own name. And, if appellee had probated his will in this State, it is true, she might, as executrix, have maintained a similar suit.

At the time of his death, Foster was a citizen of the State of Florida. His will seems to have been duly probated, according to the laws of that State. Administration upon his estate, it is not controverted, was regularly committed to appellee there, in accordance with the provisions of the will. This will has never been probated in Texas, and there has been no grant of administration upon his estate in this State.

It is needless to say that the general rule, that a foreign executor or administrator cannot maintain a suit in this State, in virtue of his foreign letters testamentary or of administration, is as fully recognized with us as elsewhere. (Story Conf. Laws, sec. 513.) This proposition is not controverted by appellee's counsel. They insist, however, that the notes, being personal property, notwithstanding the debtor

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resided in this State, could be disposed of by will, in accordance with the law of the domicile of the creditor, as this is not forbidden, nor in conflict with the law or policy of this State. We are not at all disposed to cavil with this proposition, and admit, if personal property is bequeathed by a specific legacy in a foreign country, and the legatee, under an administration there, is admitted to the ownership, he may afterwards sue in his own name for the property here, without the probate of the will, (Story's Confl. of Laws, sec. 516;) but, to maintain such a suit, the plaintiff must unquestionably show that the title or right to the property has passed to and fully vested in him; and that he is entitled to bring his suit in his own right, and not in a trust or representative capacity, by virtue of a foreign appointment.

Unquestionably, appellee does not show herself within this rule. The copies of the will do not show that she is entitled to these notes, as legatee, or that her ownership of them, as such legatee, has been admitted under the administration on Foster's estate in Florida. For aught that can be said, from the record before us, the entire estate may be required to discharge its liabilities; and so far from her having a specific right of property in these notes, as legatee under the will, it plainly shows, as we think, directly the contrary.

The will commits the entire management of the estate to appellee, and appoints her sole executrix during her life. It is true, the testator also bequeaths to her his entire estate, both real and personal, but this is upon the trusts declared and set forth in the will. To fulfill these trusts, she is directed, as soon as can be conveniently and advantageously done, after the testator's death, to convert the entire estate, with the exception of a few enumerated articles, into money, and to invest it in Government securities, or such other securities as she should think safe. Now, certainly, appellee does not get these notes in her own right, but must have them for collection, either as the executrix or trustee for the legatees. The ultimate interest which she has in her own

Argument for the appellees.

right, is merely the yearly interest received from the securities in which she shall invest the money realized by the conversion of the property of the estate, as directed by the will, or a certain yearly allowance out of it for her life. She is given no immediate property, in her own right, in the notes. She holds and must collect them, not in her own right, but in order that she may fulfill and carry out the provisions of the will. This she cannot not do in this State until the will has been probated, as is required by its laws.

When appellant pays the notes, he will be entitled to a valid deed for the land. In her petition, appellee alleges her willingness and ability to make such a deed; but evidently she cannot do so until the will is probated here. The answer, however, did not allege, with sufficient particularity, the defects in appellee's title, or show wherein she was unable to make a valid deed. Consequently, if appellee had not failed to show a right to maintain her action, there would have been no good ground shown for the reversal of the judgment.

REVERSED AND REMANDED.

L. A. HESTER v. J. R. DUPREY AND J. T. HARCOURT.

1. SHERIFF'S SALE.—A sale of land made by sheriff, under writ of execution after return-day of the writ, is void, and conveys no title to the purchaser.
2. APPROVED: *Towns v. Harris*, 13 Tex., 507; and *Young v. Smith*, 23 Tex., 600.

APPEAL from Lavacca. Tried below before the Hon. William A. Burkhardt.

The opinion recites the facts upon which it is based.

Miller and *Sayers*, for appellant.

John T. Harcourt, for appellees.

ROBERTS, CHIEF JUSTICE.—There was a suit brought by David Ayres, against R. W. Duprey, for one half of a league and labor of land, in which there was a judgment for the defendant Duprey. Being taken to the Supreme Court, by appeal, the judgment was reversed and cause remanded. (Ayres v. Duprey, 27 Tex., 593.) An execution was issued from the Supreme Court for the costs in said court, against Duprey. The same land was levied on, sold, and bought at the sheriff's sale by said Ayres; after which, a mandate having issued, and the cause being reinstated upon the docket of the District Court of Lavacca county, and being called for trial, the bond that had been given for cost was withdrawn, by leave of the court, and of the officers of court, and for want of a bond, it was adjudged that the "cause be dismissed at the cost of plaintiff, and that the officers of court do have and recover of and from the plaintiff, D. Ayres, all costs in this behalf expended, for which execution may issue." This judgment was rendered on the 5th of July, 1871.

After the plaintiff, in the present suit, had offered and read in evidence the facts constituting the history of the title to the land, down to this judgment, he then offered in evidence the execution issued upon it, with the return of the sheriff thereon indorsed, showing that he had purchased the land levied on, as the property of David Ayres, with the sheriff's deed to him, to which the defendants objected, upon the ground (in addition to others) that the sale was made by the sheriff after the return-day of the execution. The execution was returnable on the first day of the term, which was on the 6th day of November, 1871, and the sale took place, as shown by the sheriff's return and deed, on the first Tuesday of November, 1871, which was the seventh day of said month. (Paschal's Dig., art. 6234; Almanac of 1871.) The court sustained the objections to this evidence so offered, and excluded it from the jury, to which the plaintiff excepted. Whereupon the plaintiff took a non-suit, with leave of the court, and made a motion to set it aside, on account of the

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ruling of the court in excluding said evidence, which motion being overruled by the court, plaintiff gave notice of appeal, and on that ground seeks a reversal of the judgment of the court against him.

The only question presented in the case is, did the court err in excluding the said evidence upon which the plaintiff's title depended? (*Osborne v. Scott*, 13 Tex., 61.)

The land having been sold by the sheriff, under the writ of execution, one day after it was *functus officio*, the sale was void, and conveyed no title to Hester. This was directly held by this court, in the case of *Towns v. Harris*, 13 Tex., 507.

The same rule of law has been subsequently recognized, with the reason given why it is particularly applicable to an execution sale of land. (*Young v. Smith*, 23 Tex., 600; *Paschal's Dig.*, art. 3775.)

There being no error in the ruling of the court in excluding the evidence which was offered, the judgment must be affirmed.

AFFIRMED.

J. W. HENDERSON ET AL. v. CARRIE E. FORD ET AL.

1. HOME—RESIDENCE.—The home or residence of a single man, with his servants, upon land owned by him in 1860, and until he entered the Confederate army in 1861, was not abandoned by his absence in the army.
2. SAME.—Nor was his authority left with an agent to sell the land, an abandonment.
3. DOMICILE—MARRIAGE.—Upon the marriage of a resident of Texas with a woman in Alabama, with the intention entertained to make Texas their residence, the domicile of the wife became that of her husband.
4. SAME—HOMESTEAD RIGHTS.—Upon the marriage, in another State, of a man who has a residence upon land in Texas belonging to him, the wife's domicile being fixed in Texas by the marriage, she becomes entitled to homestead rights in the Texas home of her husband.

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5. SAME—REVOCATION OF POWER TO SELL.—A power of attorney to sell land, the home of a single man, is revoked by his marriage.
6. HOMESTEAD.—A single man resided on his own land in 1860, living with his slaves in cabins, and cultivating a field, and until September, 1861, when he entered the Confederate army and left the State, leaving an agent, authorized to manage his affairs and to sell the land. He married, in 1863, in Alabama, in contemplation of a permanent residence in Texas, and in the fall of that year, from ill health, returned home, and in a few months contracted for the sale of his said residence, and effected the sale through the attorney appointed by him on entering the army. The wife joined her husband in Texas, in 1863, remaining with him, moving from place to place with his relatives until his death in 1866, and returned to Alabama two or three months after the death of her husband, having no other homestead: *Held*, That the widow was entitled, as against the vendee of her husband, to homestead rights.

APPEAL from Fort Bend. Tried below before the Hon. Livingston Lindsay.

In 1860, Drury B. Bohanon became the owner of a tract of 328 acres of land in Fort Bend county. He inclosed a field of twenty-five acres; erected four or five cabins thereon; was a single man, and resided with his negroes on the place, cultivating it until September, 1861, when he joined the Confederate army. When he left, he empowered his brother-in-law, Dr. Prince, to sell the land, and to manage his business in Texas. The farm was cultivated by Bohanon's negroes, under the control of Dr. Prince. Bohanon married in Selma, Alabama, and in the latter part of the year 1863 returned to Texas on account of ill health, having consumption, leaving his wife in Alabama. After the close of the war, the wife came alone to Texas, having been written to by her husband, and walked part of the way, twelve miles, from Indianola, to where her husband was boarding. They lived with Dr. Prince and others, and in Fort Bend county, except a few months in Huntsville, Walker county, where Dr. Prince had removed.

Bohanon died in April, 1866, at Huntsville, at the house of Dr. Prince, of consumption.

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In February, 1864, Bohanon, while his wife was in Alabama, and before she came to Texas, sold the land to Henderson and Chapman; he sent Dr. Prince to Houston to get the Confederate money, for which it was sold, and on receiving it, executed a deed, under the power of attorney executed in 1861, to the purchasers.

Bohanon and wife had never occupied the land after their marriage. The purchasers knew of the marriage before the purchase-money was paid and the deed executed. After Bohanon's death, his widow remained in Texas two or three months, and then returned to Alabama. At his death, Bohanon had no other property, and had desired to sell the land for the purpose of joining with Dr. Prince in the purchase of another tract adjoining Prince's farm. At the time of the sale, the premises were in a very dilapidated condition—fences down, and the cabins, made of poles, were in ruins, no one occupying them.

The widow, Mrs. Carrie E. Ford, brought suit against the purchasers for her homestead interest of 200 acres. Pending the suit, she married Rice. On the trial, the jury returned a verdict for her, on which judgment was rendered. A new trial having been overruled, the defendants appealed. The questions discussed in the opinion arise from the application of homestead laws and laws of domicile, to the facts. It is not, therefore, necessary to give any further statement of the pleadings or exceptions, &c., forming part of the record.

M. W. Garnett and F. W. Henderson, for appellant.

John T. Harcourt, for appellees.

MOORE, ASSOCIATE JUSTICE.—All of the errors assigned by appellants for the reversal of the judgment, unless it is the first, are too general and indefinite to require of us any special notice; and while the first supposed error pointed out by the assignment may not be subject to this objection, it is, intrinsically, entitled to no serious consideration. It has not been noticed by counsel for appellants, in their brief, and

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we may reasonably conclude that on reflection it was deemed by them to be untenable, and therefore abandoned.

If, however, we can regard the other errors complained of in the assignment as sufficiently definite, and as properly presenting for our consideration the objections to the judgment discussed by appellant's counsel, and upon which its reversal is insisted, we are constrained to say, in view of the numerous decisions of this court upon the subject, that we can see nothing in the record of which appellants have any cause to complain.

It cannot certainly be denied that the land in controversy was the home and residence of appellee, Carrie E. Ford's, former husband, D. B. Bohanon, from the time he improved and moved upon it, in 1860, until he joined the Confederate army, in the fall of 1861. Bohanon was, during this time, a single man, and the dwelling which he occupied was no doubt of a very unpretentious character, and may have been ultimately intended for the occupation of his servants, instead of himself; still, as it is not controverted that he and his servants lived upon the place, it must be admitted, if a man who has no family except his servants, may have a homestead, that he was entitled to a homestead on this land prior to his leaving it to join the Confederate army. There certainly can be no pretense that the possession and occupancy of the place was surrendered by Bohanon when he went to the army. He left his negroes upon it, and they continued upon and cultivated it for him, under the direction and control of his agent and brother-in-law, Dr. Prince, until its sale, in 1864, to appellants. Unquestionably, it cannot be held that the mere fact of one's absence from his home, in the discharge of public duty as a soldier, will operate as an abandonment or forfeiture of his homestead rights. But it is insisted, because Bohanon, when he left for the army, authorized Dr. Prince to sell the place, with the view of purchasing another tract of land adjoining Dr. Prince's land, it must be presumed that he did not intend to return to or continue to live upon this

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land, and that he thereby abandoned it as his homestead; and especially so, it is said, as on his final return from the army, some three or four months before the sale, he did not reside upon it, but remained at Prince's.

In response to this, it will suffice to say, that it may be conceded that Bohanon wished to sell this land for the purpose of purchasing another tract which he regarded as more desirable; and that he hoped and expected that his agent would be able to effect a sale of it for him before his return to the State. But certainly this does not import an intention to abandon his home unless it should be sold; and evidently, it cannot be held, without coming in conflict with the entire current of the former decisions of this court, that the mere fact of a man's contemplating the sale of his homestead prior to or at the time of his marriage, or that authority previously conferred upon an agent to sell it, is unrevoked if it is still his homestead at the time of his marriage, will authorize him to sell it, either in person or by his agent, without his wife's joining in the conveyance. And as Bohanon was married previous to his final return from the army, if the homestead rights of his wife had attached, he evidently could not acquire the right to alienate the homestead, without his wife's consent, by temporarily abandoning it and residing elsewhere for the short time he was here before the sale. But aside from this, the testimony does not warrant the inference that his failure to return to and reside upon the place was because of its having been abandoned as his home and permanent place of abode, unless he should sell it, but that he staid at Dr. Prince's on account of his health and for medical treatment.

There being no just ground to infer that Bohanon had abandoned his home upon the land previous to his marriage, and there being no evidence to authorize the inference that he contemplated, either before or after his marriage, a removal from Texas—while, on the contrary, it clearly appears that the contract of marriage, both with him and his wife,

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was made in the contemplation of a permanent residence here,—their marital rights in the courts of this State, at least, must unquestionably be construed and determined by our laws. (Story's Confl. of Laws, secs. 194–200.)

It follows, as a necessary consequence, as Mrs. Bohanon did not join in the deed to appellants, it was inoperative and void against her, to so much of the land as was included in the homestead, unless she is in some way estopped or precluded from controverting it. By the marriage, as has been said, Mrs. Bohanon acquired a domicile in Texas. Her temporary absence, with the consent of her husband, evidently did not deprive her of the rights to which she was thereby entitled. And especially, as it is shown that she came here as soon after her husband as it was reasonably practicable for her to have made the trip. Though she was not in the State at the time appellants purchased the land, when they accepted the deed and paid the purchase-money, they knew that Bohanon was a married man. The fact that Henderson says he did not think, and does not now believe, (*i. e.*, at the date of the trial,) from the appearance of the place, that it was a homestead, cannot be regarded of any consequence, without repudiating the doctrine recognized by this court in all its former decisions upon this subject. The facts which came to his knowledge were fully sufficient to have put him upon inquiry, and had he endeavored to do so, it cannot be doubted that he might easily have ascertained that Bohanon resided on the land when he joined the army, and had not abandoned it or acquired any other home previous to his marriage.

As the land was sold by her husband before Mrs. Bohanon reached Texas, the fact that she did not go upon or reside on it is of no moment whatever. A wife is not required to desert or separate herself from her sick and dying husband, on penalty of forfeiting the home secured to her by the Constitution and laws.

The only remaining objection to appellee's right to a judgment is her removal from the State after Bohanon's

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death, and subsequent marriage to her present husband. If the views which I heretofore entertained with reference to the homestead right as contemplated and intended to be secured by the Constitution and laws of this State to the heads of families, and surviving constituents thereof, had been recognized as correct, I could well see that these objections might be entitled to much weight. But this court has taken a different view of the matter, at least in cases of insolvent estates. (*Reeves v. Petty*, 44 Tex., 249.) And a majority of the court are of opinion, in which I acquiesce, in consideration of the general tendency if not direct determination in previous cases, that as appellee's right as surviving wife had attached, and the sale by her husband to appellants may have operated to prevent her taking possession of the homestead after his death; and as it is not shown that she intended, by leaving the State, as she did, to abandon her claim to it; or that, under the circumstances, her going to reside with her relatives was inconsistent with her subsequent demand; and since it is not made to appear that she has subsequently acquired any other homestead,—her removal cannot be held to bar or preclude her recovery.

And if the widow gets anything more than a usufruct by the homestead right, it is not perceived that the mere fact of her subsequent marriage (without thereby getting another home) pending her suit for its recovery, can deprive her of such right.

The judgment is affirmed.

AFFIRMED.

THE GALVESTON HOTEL Co. v. C. L. BOLTON.

1. **SUBSCRIPTION OF STOCK.**—A subscription of stock in an incorporated company, or in anticipation of a company, is usually in the shape of a mutual agreement, written and signed by those desiring to be incorporators, or of a mutual undertaking in writing to be bound to

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take a share or shares in an incorporation already created, in which the nature, object, and terms of the association are to some extent indicated. The company becomes a party to the contract resulting from this mutual agreement, either expressly or by implication, from the terms of the subscription.

2. STOCK—SUBSCRIPTION—EVIDENCE—CHARTER.—The Galveston Hotel Company was incorporated under a charter, which fixed the capital stock at two hundred and fifty thousand dollars, with power to increase it to one million; which provided that ten per cent. of the amount subscribed should be deposited with the treasurer at the time of subscription, and that the company should be organized whenever fifty thousand dollars of stock should be subscribed for. Suit was brought against Bolton as a subscriber for stock in the company on a subscription, in the following form, viz :

“Subscription to Galveston Hotel Co.

“C. L. Bolton, 5 shares..... \$2,500”

The original paper was not shown to have been in the hands of the company or its officers, but was lost, and Bolton's name was not found on the books of the company as a corporator or subscriber for stock; he never paid anything on the alleged subscription, and never participated in any action of the company, but acknowledged verbally to the secretary his obligation to pay, and asked indulgence: *Held*—

1. The fact that no percentage was ever paid on the alleged subscription was admissible in evidence, as tending to show that whatever was done was an incomplete transaction, and not a consummated act of subscription.

2. From the fact, that the charter allowed the company to be organized when shares to the amount of \$50,000 had been taken, it does not follow that it could then enter fully on the performance of the enterprise for which it was chartered. Such a construction would render nugatory the provision of the charter which fixed the capital stock at \$250,000.

3. The whole capital stock must have been taken before a call for payment could be lawfully made on a subscriber.

4. When there is no provision in the charter of a corporation to the contrary, he who takes the first share of stock takes it on condition, that all of the shares will be taken until the amount fixed as the capital stock of the company shall be taken, by persons who will be equally bound with himself to bear the expense of the enterprise, share and share alike.

5. *Quere*, whether, when the charter requires a subscription to be accompanied with the payment of a percentage of the share of stock subscribed, its payment is necessary to make the subscription valid?

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6. *Quere*, whether, when the charter itself gives a remedy, by a sale of the shares of stock in default of payment of an assessment, an action can be maintained by the company against a defaulting subscriber.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

The Galveston Hotel Company brought suit against C. L. Bolton, to recover upon the subscription of said Bolton for five shares of its stock, valued at \$500 per share. Bolton subscribed for the five shares before the organization of the company. About a month after the date of the subscription, he was called upon to pay the first installment, and promised to do so, but asked indulgence for a short time. Some weeks afterwards, payment was again demanded of him, and he again promised to pay, and requested a further extension. He subscribed for five shares, at \$500 per share, in a book in the hands of E. B. Nichols, as appears from the testimony of one Thompson, as follows:

“Subscriptions to Galveston Hotel Company.

“C. L. Bolton, 5 shares - - - - \$2,500”

The company was duly organized under its charter, and calls were made for installments upon subscriptions, both by publication and personal demand. Bolton never paid anything, either at the time of subscribing or afterwards, and suit was brought to recover the full amount of his subscription for five shares, viz, \$2,500. A jury was waived, and the cause submitted to the judge, who rendered judgment for defendant; from which judgment the Hotel Company appealed.

Section 4 of the charter of the Galveston Hotel Company provides, that its “capital stock shall be divided into shares of five hundred dollars each, to be paid for in the following manner: ten per cent. of the amount subscribed for to be deposited with the treasurer of the company at the time of subscribing, and the balance at such times and in such amounts or installments as the board of directors may order.”

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Bolton paid nothing at the time of subscribing, and his name was not found in the books of the company as a corporator or subscriber for stock.

The case of the same plaintiff *v.* Barney Tiernan, was, by agreement, considered in connection with the case against Bolton. The only difference between the cases is, that Tiernan, after his subscription, and before the organization of the company, notified some of the solicitors that he wanted his name off the books, and would not pay his subscription. Tiernan also refused to pay when first called on.

Ballinger, Jack & Mott, for appellant.

I. The defendant's subscription was preliminary to the organization of the company under its charter. He became a partner in the intended undertaking. It was a contract, entered into between him and the other subscribers, and raised a mutuality which rendered him liable to the company after its organization. He agreed with the other subscribers that he and they would jointly perform a certain thing, which required their joint action to perform. Upon the strength of his subscription, he incurred obligations to the other subscribers (just as they incurred obligations each to the other) from which he could not be exonerated by his failure to pay the first installment at the time of subscribing. It was his duty to have paid it, and he cannot be permitted to avail himself of his own wrong.

[In support of this proposition, they cited *Wight v. S. R. Co.*, 16 B. Monr., (Ky.), 4; *Vicksburg R. R. v. McKean*, 12 La. Ann., 638; *Mitchell v. The Rome R. R. Co.*, 17 Ga., 588; *Smith v. Plank Road Co.*, 30 Ala., 655; *Red River Co. v. Young*, 6 Rob., (La.), 30.]

II. Section 5 of the charter provided, that the company should be organized whenever fifty thousand dollars of stock should be subscribed for. Taking sections 4 and 5 together, it is very clear that the Legislature never intended that the payment of the ten per cent. should be a condition precedent

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to the validity of the organization, or that such payment should be necessary to the validity of the subscription. On the contrary, it expressly declares that the company should be organized whenever fifty thousand dollars of stock should be subscribed for. If it intended that the company should not be organized until the stock should be subscribed for, and the ten per cent. paid, it would have said so; but it does not say so, either in direct terms or by implication. The organization of the company, after the \$50,000 subscription, was perfectly valid, though not one cent had been paid in; and if this be so, it follows that the subscriptions were equally valid. The clause in section 4 provides no mode of subscription, and lays down no requisites for its validity. It merely provides the mode in which the stock shall be paid for. This was intended for the protection of stockholders against arbitrary demands of the directors, who could only require ten per cent. at the time of subscription, and ten per cent. not "oftener than once within every thirty days." The directory could extend the time of payment of the original or any subsequent installment upon the stock, without in any way impairing the validity of the subscription, and, if they chose to do so, it was to the benefit of the subscriber, and he could not complain of it. We do not think it will be denied, that the organization of the company, after the requisite amount had been subscribed for, was perfectly legal, and we think it follows that the subscriptions themselves were valid, and can be collected by the company. This point was elaborately discussed in *Mitchell v. The Rome R. R. Co.*, 17 Ga., 588, and, we think, decided by the court upon the soundest principles of reason.

[To support this proposition, counsel also referred and quoted at length from *Vicksburg R. R. v. McKean*, 12 La. Ann., 638, and *Smith v. Plank Road Co.*, 30 Ala., 655.]

III. The testimony of T. E. Thompson, who was a canvasser for subscription and one of the incorporators named in the charter, shows that, after the organization of the com-

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pany, he twice demanded of Bolton payment of his first installment, and that, on both occasions, Bolton admitted his liability, but asked an extension of time. Under the charter, the demand for payment of the first installment was not required to be made, until after the company was organized. He asked extension of time on account of immediate pressing need of money. The demand was again made, and again he asked an extension of time. In the mean time, other parties, who had entered into the contract jointly with him, were paying up. They had confidence in the *bona fides* of his subscription, and had a right to demand from him a compliance with the terms of the agreement. The company was at work, and we have a right to assume that the directors were making contracts and incurring obligations, predicated upon their entire subscription list. When approached on the subject by an incorporator, who was named in the bill, Bolton admits his liability, promises to pay, but asks a little time. He cannot be allowed to mislead others by his subscription, and then take advantage of his own wrong to avoid responsibility; and, by every principle of equity, he should be required to pay the amount he stipulated to pay.

We are aware that, in some of the States, the courts have held, that the payment of the first installment required by the charter was a condition precedent to the validity of the subscription. It was so decided by the Supreme Court of Pennsylvania, in *Hibernia Turnpike Co. v. Henderson*, 8 Serg. & Rawle, 219, but, as the court was divided on the subject, this case is not entitled to the weight it might otherwise receive.

The leading case, however, against us is the *Union Turnpike Co. v. Jenkins*, 1 Caine's Cases, (N. Y.,) 86, which was decided by the Court of Errors, and which is most frequently alluded to by courts that have held the same doctrine.

In this case, the Supreme Court of New York held, that the non-payment of the first installment did not affect the

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validity of the subscription, (1 Caine's Reports, 381;) yet the decision was reversed by the Court of Errors, as before stated. The conclusion arrived at by the Court of Errors, in that case, has never been satisfactory to the professional minds of the country; and though the laws of the State of New York made the decisions of that court binding as authority in that State, the courts, even there, have been disposed to question its correctness. Other States, however, have either questioned which was the better authority, or have boldly announced the Supreme Court of New York to be of equal authority with the Court of Errors. The case was criticised in *Piscataqua Ferry Co. v. Jones*, 39 N. H., 499, *et seq.*; and the Supreme Court of Vermont, in *Vt. Central R. R. Co. v. Clayes*, 21 Vt., 35, say, that though the Court of Errors reversed the decision of the Supreme Court, it may be well questioned which is the better opinion. The Supreme Court of Alabama, (7 Ala., 674,) in speaking of the Union Turnpike case, use the following language: "We know that the Court of Errors of that State is composed of laymen, as well as judges, and cannot, beyond the limits of that State, be considered a higher authority than that of the Supreme Court."

Gresham & Munn, for appellee, contended that the facts in evidence did not constitute the appellee a subscriber to the capital stock of the company. They relied on the fact that the book in which Bolton subscribed, was at the time in the hands of one E. B. Nichols; that the company had not then been organized, and that Nichols had not been authorized to canvass for subscriptions. They cited *Pittsburg and Stubenville R. R. Co. v. Gazzam*, 32 Penn., 340; *Angel and Ames on Corporations*, secs. 229 and 231; *New Bedford and Bridgewater Turnpike Co. v. Adams*, 8 Mass., 141; *Essex Turnpike Corporation v. Collins*, 8 Mass., 297. They contended that no valid subscription could be made, unless ten per cent. of the amount of stock subscribed for was paid at the time of the subscription, relying on section 4 of the charter.

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They also insisted that no valid assessment for the general purposes of the corporation could be made, until the minimum amount of capital stock, fixed by the charter, had been subscribed for, citing *Salem Milldam Corp. v. Ropes*, 6 Pick., 23; *Worcester and Nashau R. R. Co. v. Hinds*, 8 Cushing's R., 110; *Penobscot R. R. Co. v. Dummer*, 40 Maine, 172; *Angel and Ames on Corp.*, sec. 146; *Redfield on Railways*, sec. 51, and cases there cited; *Stoneham Branch R. R. Co. v. Gould*, 2 Gray, 277.

George Mason, for appellee Tiernan, cited the following cases: *The Salem Milldam Corp. v. Joseph Ropes*, 6 Pick., 23; *Central Turnpike Corp. v. Valentine*, 10 Pick., 142; *Penobscot R. R. Co. v. Dummer*, 40 Maine, 172; *Stoneham Branch R. R. v. Gould*, 2 Gray, 277; *Worcester and Nashau R. R. v. Hinds*, 8 Cushing, 110; and also, 1 *Redfield on Railways*, 176, with the cases there cited. On the question that there was no contract of subscription: *Turnpike Co. v. Collins*, 8 Mass., 291; *Pittsburg and Stubenville R. R. Co. v. Gazzam*, 32 Penn., 340; *New Bedford and Bridgewater Turnpike Co. v. Adams*, 8 Mass., 141.

Ballinger, Jack & Mott, in reply, argued, at length, the proposition that the fact of two hundred and fifty thousand dollars, the amount authorized by the charter, not being subscribed for, did not affect the obligation of appellee, and cited the opinion of Mr. Justice Duncan, in *Hibernia Turnpike Co. v. Henderson*, 8 Serg. & R., 228. On the question of the non-payment of the ten per cent. at the time of subscribing, they cited *Leighty v. President*, 14 Serg. & R., (Pa.) 434; and *Angel and Ames on Corp.*, secs. 518, 519.

ROBERTS, CHIEF JUSTICE.—The questions in this case are, 1st, did appellee ever become a corporator in the company? and 2d, if he did, were the assessments legal and binding upon him? and 3d, was this suit properly brought to recover the amounts assessed against him?

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These will be considered without any special reference to the division here made.

A subscription of stock in an incorporated company, or in anticipation of a company expected to be incorporated, is usually in the shape of a mutual agreement, written and signed by those desiring to be corporators, or of a mutual undertaking in writing, to be bound to take a share or shares in an incorporation already created, in which the nature, object, and terms of the association are to some extent indicated. Whether in one shape or in the other, the mutual agreement, or undertaking of all of the subscribers, may constitute the consideration for the agreement, or undertaking, of each one of them, so as to make it a valid contract in favor of and against each, to be carried out or enforced by the company when organized, if not already recognized. The company becomes a party to the contract, either expressly or by implication, from the terms of the subscription. An example may be here given, by way of illustration.

“Contoocook Valley Railroad subscription for stock :

“We, the subscribers, hereby agree to take the shares set against our names, being at \$100, and to pay the amount in such assessments, as the directors for the time being may order, said subscription to be expended between Contoocookville and Henniker West village.

“Joseph Barnard, Jr. - - Ten shares.

“H. E. Perkins - - - Twenty shares.”

This subscription should be preserved in a stock book, or in some shape, as part of the papers of the company, being the foundation and evidence of the obligation of the subscribers.

Should it be deficient in its terms, so as not to contain an express obligation upon which to bring a suit, such facts should be stated in connection with, and in addition to it, as would show it to be a cause of action.

The petition in this case states the general conclusion, that

the defendant subscribed for five shares of stock, instead of setting out the subscription, with such other facts as would give effect to it as a contract, binding on the defendant in favor of the company. There is, however, no special exception to the petition on that account, and this specification of what should have been alleged is made, as showing the character of the evidence necessary to establish a cause of action against the defendant.

The subscription, upon which this suit was brought, was in form as follows :

“Subscription to Galveston Hotel Co.

“C. L. Bolton, 5 shares - - - - - \$2,500.”

The facts proved in connection with this were, that it was seen before the organization of the company in the hands of one, who is not shown to have had any authority to procure subscriptions, written on a paper which is lost, and is not shown to have ever been in the possession of the company, or of its officers; the said Bolton's name is not found on the books of the company as a corporator, or subscriber for stock; he did not pay the ten per cent. upon his subscription, when it was made, if made as a subscription; has never paid anything on it, and has never participated in any action of the company, but after the organization of the company acknowledged to the secretary his obligation to pay his percentage, and begged time on it on two occasions, when his attention was called to it by the secretary.

The conclusion that these facts, in connection with that paper, would tend to establish, is, that it was carried around in an experimental effort to ascertain who would subscribe, and how much, rather than that it was a subscription in fact, and that his acknowledgment of his obligation to pay his percentage was prompted by a feeling of honorable, rather than of legal, obligation. (*P. & S. R. R. Co. v. Gazzan*, 32 Penn., 340.) It contains no express undertaking, and there are no sufficient facts proved to establish, in connection with it, an implied undertaking, and there is nothing to show that it

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was ever a paper in the possession of, or belonging to the company.

There having been no percentage paid, is an important fact as evidence, tending to show that, whatever was done, was an incomplete transaction, and not a consummated act of subscription. That effect may certainly be given to it. It is contended that this fact alone is sufficient to relieve the defendant from responsibility as a subscriber, as in that event the company would not be bound to recognize him as a subscriber. The chief argument of counsel is on this point. There would seem to be very weighty reasons why, when a charter requires a subscription to be accompanied with the payment of a percentage of the share of stock, its payment is necessary to make the subscription valid. (*Jenkins v. Union Turnpike Co.*, 1 *Caine's Cases*, 86; *P. M. & Co. Hibernia Turnpike Road v. Henderson*, 8 *Serg. & Rawle*, 217.) We are referred to decisions that hold differently. (*Wright v. Shelby R. R. Co.*, 16 *B. Monr.*, 4; *V. S. & Texas R. v. A. C. McKeen*, 12 *La. Ann.*, 634; *Mitchell v. The Rome R. R. Co.*, 17 *Ga.*, 588.)

Upon the question also of whether this action by the company for the amount assessed can be maintained, when the charter itself gives a remedy, as was done in this charter, by a sale of the shares of stock, upon a default of the payment of an assessment, we find a conflict of decision. (1 *Redfield on Railways*, sec. 594; *New Bedford & B. T. Corporation v. J. Q. Adams*, 8 *Mass.*, 137.)

Without deciding these legal questions, it will suffice to say, that the evidence was not sufficient to establish that the defendant was not a legal subscriber, so as to bind him for the assessments, as, we must presume, was the conclusion of the judge to whom the facts and law were submitted.

There remains to be considered the very important question of whether or not the company had a right to make these assessments, for the general purposes of the corporation, before the amount of \$250,000 had been taken in

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shares, that being the amount of the capital stock fixed by the charter, with a power to increase it to \$1,000,000 by a two-thirds vote of stockholders.

It is argued by counsel for the plaintiff, that, as the charter allowed the company to be organized when shares to the amount of \$50,000 had been taken, the intention was thereby indicated that the company should then enter fully upon the performance of the enterprise for which it had been chartered. That construction of the charter would render nugatory the most important provision of the charter, which is the amount of its capital stock, fixed at \$250,000. That was the amount which the Legislature must have supposed would be sufficient to erect a first-class hotel in the city of Galveston. Their fixing it at that amount shows, that they did not believe that \$50,000 would be sufficient for that purpose. There were good reasons for organizing the company, to be found in the increased facility of thereby raising the subscription to the amount fixed for the capital stock, and of other preliminary preparations for the execution of the work, when the subscription should reach that amount.

It is laid down by a law writer, that "it is an essential condition to making calls in those companies where the number of shares and the amount of capital is fixed, that the whole stock shall be subscribed before any calls can be lawfully made." (1 Redf. on Railways, sec. 51, p. 175.) This is supported by numerous authorities, and none in opposition to it have been cited by counsel, or found by us. (*Salem Milldam Corp. v. Ropes*, 6 Pick., 23; *Stoneham B. R. R. Co. v. Gould*, 2 Gray, 277; *Central T. Corp. v. Valentine*, 10 Pick., 142; *Contoocook V. R. R. v. Barker*, 32 N. H., 363; *Penobscot R. R. Co. v. Dummer*, 40 Me., 172; *Littleton M. Co. v. Parker*, 14 N. H., 543.)

In the above case, cited from 2 Gray, Chief Justice Shaw says: "This is no arbitrary rule. It is founded on a plain dictate of justice and the strict principles regulating the obligation of contracts. When a man subscribes a share to a

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stock, to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept, that the remainder will be taken, he would be held, if liable to assessment, to pay a five hundredth part of the cost of the enterprise, besides incurring the risk of the entire failure of the enterprise itself, and the loss of the amount advanced towards it." Thus, when there is no provision to the contrary, the man who takes the first share of stock takes it on condition that all of the shares will be taken, until the amount fixed as the capital stock of the company shall be taken by persons who will be equally bound with himself to bear the expense of the enterprise, share and share alike. In principle, it is the same as if one would say, "I will be one of five hundred persons who will bind themselves to contribute equal amounts, not exceeding five hundred dollars each, in building a first-class hotel in Galveston." The proposition is not accepted and contract made so as to bind the proposer, if only two hundred and fifty persons join in it.

The evidence shows that the stock of \$250,000 was never subscribed, and therefore, under the rule here announced, the assessments were unauthorized and illegal. If otherwise, this action could have been maintained.

Judgment affirmed.

AFFIRMED.

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ABANDONMENT.

DOMICILE, 1, 2.

1. A survey in Mercer's colony being in conflict with an older survey, patent thereon was refused on the field-notes; subsequently a resurvey was made of that part of the land not in conflict, on which patent was issued, the original field-notes not being found in the land office, and the register of their return showing an erasure of the original number of acres and the reduced number inserted instead: *Held*, That the resurvey was a presumptive relinquishment of that part not included in the resurvey. *Austin v. Dungan*, 236.

2. A subsequent appropriation by the original claimant should be initiated by a file or location in the county surveyor's office, and not by indicating a claim to it in the land office upon the original field-notes and surveys abandoned. *Id.*

ABATEMENT.

Where suit was brought by the legal owner of a promissory note, executed for the purchase-money of a tract of land, the legal title to which was in the vendor, in trust, the defendant cannot plead in abatement the non-joinder of those equitably interested in the purchase-money for which the note was given. *Simpson v. Foster*, 618.

ACCOUNT.

ESTATES OF DECEDENTS, 5.

ACKNOWLEDGMENT.

AUTHENTICATION, 1.

CERTIFICATE OF ACKNOWLEDGMENT.

ACTION.

DAMAGES, 17, 19.

FOREIGN ADMINISTRATOR, 2.

1. Plaintiff sued for damages, for the loss of his horse and injury to his buggy, occasioned by the negligence of the city of Navasota in keeping its streets in repair. The horse fell in harness, rolled into a

ACTION—*continued.*

ditch, was killed in the affair, and the buggy broken: *Held*. That no action lay against the city. *City of Navasota v. Pearce*, 526.

2. There is no such liability by statute, and the decision is based upon the rule at common law. *Id.*

ADMINISTRATION.

ATTORNEYS' FEES, 1, 2, 3. PRACTICE IN DISTRICT COURT, 1, 5.

CLAIMS AGAINST ESTATES. PROBATE MATTERS, 3.

ESTATES OF DECEDENTS. STALE DEMAND.

1. An affidavit supporting a claim against an estate made by an agent is not invalid because it does not show such agency; and an administrator knowing the affiant to be the agent of the owner of a claim, may approve such claim. *Heath v. Garrett*, 23.

2. Reasonable attorneys' fees for necessary service actually rendered in an estate, form part of the expenses of administration. *Gammage v. Rather*, 105.

3. Whilst it would be the better practice to present to an administrator, for allowance and approval, the mortgage, as well as the notes, against the estate, which it was executed to secure, yet the presentation and allowance by the administrator of the notes alone will be sufficient to authorize a suit to foreclose the mortgage. *Canon v. McDaniel*, 303.

4. The fact that an affidavit, proving up notes against an estate, for allowance and approval, was made by one not a party to them, nor representing himself in the affidavit to be an agent of the party, cannot be made available, except in a direct proceeding to set aside the approval. The allowance and approval, being in the nature of a judgment establishing the notes, cannot be attacked in a collateral proceeding. The same rule applies, after approval, when, in the certificate of authentication for allowance, the word "payments" has been left out. *Id.*

5. An administration was granted in May, 1840, the record showing no extension of time and no action therein until 1851: *Held*, That the presumption of law is that it was closed. *Marks v. Hill*, 345.

6. Prior to the probate act of 1848, no law of Texas authorized the setting aside of property at its appraised value for the support of the wife and children. *Id.*

7. If the decedent was of the class of persons whose estates were protected in the act of May 18, 1838, (Hart. Dig., art. 984,) and in the act of January 14, 1841, (Paschal's Dig., art. 1400,) as "volunteers from a foreign country, who may have fallen in the battles of the Republic," &c., it should be held that a grant of administration upon his estate, and all proceedings had therein, touching the administration, were absolutely void. *Vogelsang v. Dougherty*, 466.

ADMINISTRATORS.

ADMINISTRATION, 1.	EVIDENCE, 17.
ATTORNEYS' FEES, 3, 4.	FOREIGN ADMINISTRATOR.
ESTATES OF DECEDENTS, 2.	PROBATE MATTERS.

ADMINISTRATORS' SALE.

1. A colonist, with his wife, settled in Mercer's colony, in 1847, soon after which both died. The husband's estate was alone administered on, and a colony certificate for 640 acres was issued in the name of the husband, and sold by the administrator: *Held*, That if legally sold, in due course of administration, such certificate being community property, the sale passed the legal title to it, and to any land on which it might be located, from the heirs of both the colonist and his wife. *Simmons v. Blanchard*, 266.

2. Such a certificate was sold, under order of the County Court, by the administrator, on the estate of the deceased colonist in 1851, and the money paid by the purchaser; there was no formal confirmation of sale, but the same was reported by the administrator to the court, in an exhibit showing the condition of the estate, two years after which the court ordered the administrator to make title to the purchaser to a part of the land afterwards covered by the certificate, which had been patented to the heirs of the colonist. Appellees claimed the land under the original purchaser at administrators' sale: *Held*, That these facts, in connection with other undisputed mesne conveyances to appellees, constituted a right in them to the land as against the heirs of the colonist's wife. *Id.*

ADMISSIONS.

ATTACHMENT, 9.

A statement of facts purporting to contain the testimony of a party to a suit in a former trial, but which was not signed by him, does not stand on the footing of admissions in writing, and is not admissible against him. *Castleman v. Sherry*, 229.

AFFIDAVIT.

ADMINISTRATION, 1.
ESTATES OF DECEDENTS, 2.

AFFIRMANCE ON CERTIFICATE.

WRIT OF ERROR BOND.

1. The act to regulate proceedings in the Supreme Court, of April 2, 1874, which provided that when a party is unable to file in the Supreme Court the transcript of a case, in the time limited by the statute, from any unavoidable cause, the court shall, upon satisfactory proof thereof, permit such transcript to be filed at a later period, conferred, in that, no new right, but was in accordance with the practice of the Supreme Court, founded on a former statute. (See Paschal's Dig., arts. 1589, 1590.) *Hunt v. Askew*, 247.

AFFIRMANCE OF CERTIFICATE—*continued.*

2. When a complete transcript is filed by appellee, in place and as a substitute for a certificate, and it is found to contain those parts of a case which are required to be certified to in a certificate, it may be acted on by the Supreme Court as such; and for that purpose, may be filed without asking leave of the court. *Id.*

3. Either party has a right to apply for and obtain an attested copy of the record, and file it in the Supreme Court for its adjudication, within the time prescribed, but neither party has a right to rely on the other party to do it. Neither party is bound to file it after obtaining it, unless it should suit his own wishes to do so. *Id.*

AGENT.

ATTACHMENT, 7.

PRINCIPAL AND AGENT.

1. Parol evidence is admissible to show that the articles enumerated in a receipt given by the agent of the creditor were never, in fact, delivered to the agent, and this, though the instrument on its face specified that the articles are "hereby turned over and delivered" to the agent. *Pool v. Chase*, 207.

2. A power of attorney to sell and convey all lands owned in the State of Texas by the principal, invests the agent with power to sell any specific tract in the State to which his principal may have title. *Baxter v. Yarborough*, 231.

ALIENATION.

1. The colonization law of March 24, 1825, did not prohibit a conveyance of land acquired by a colonist, after the expiration of six years from the date of the colonist's title. *Thomas v. Moore*, 433.

2. A colonist, who acquired land as such, under the colonization law of 1823, was permitted to alienate the same at any time after receiving the grant. *Id.*

AMENDMENT.

PLEADING.

PRACTICE, 14.

SUIT BY PUBLICATION, 1.

1. The appropriate use of an amendment to the petition is to give a more full and clear statement of the cause of action alleged in the original; and a definite description of land, against which it is sought to enforce the vendors' lien, may be given by amendment. *Spencer v. McCarty*, 213.

2. The defendant is bound to notice the filing of such amendments, and judgment by default may properly be taken without service of notice of filing. *Id.*

3. After both parties to a suit have announced ready for trial, and exceptions to the petition have been overruled, it is in the discretion of the court whether the plaintiff will be permitted to amend, and

AMENDMENT—*continued.*

again give a full statement of his cause of action—such amendment not having been rendered necessary by the ruling of the court. *Hays v. H. G. N. R. R. Co.*, 272.

4. An amendment correcting the description of a call made for the beginning corner of the field-notes of a tract of land sued for, and which amendment is but a better description of the same tract of land claimed in the original petition, is not a new suit. *Jones v. Burgett*, 284.

5. In such case, limitation is stopped by the filing of the original petition, as against the defendant. *Id.*

6. The right to amend pleading is limited, as to the answer, that the defense must be filed in due order of pleading. *Simpson v. Foster*, 618.

7. Where a plea has been inadvertently filed, and it thereby cuts off a substantial defense, the court should, on proper application, allow such plea to be withdrawn, to enable the defendant to plead his several defenses in due order of pleading. *Id.*

APPEAL.

JUDGMENT, 3.

PRACTICE, 9.

WRIT OF ERROR.

1. No appeal lies to the Supreme Court of the State from an order removing a cause to a Federal court, there being no final judgment, in contemplation of law, rendered. The right of the party to have the cause transferred, on his application, under the laws of the State and of the United States, could only be inquired into by the Supreme Court of the State, on a refusal of the application, and after final judgment. *Durham v. Southern L. I. Co.*, 183.

2. When, of several defendants in an action, one only appeals, the case will be considered on appeal only with regard to such matters as affect the rights of appellant. *Cannon v. McDaniel*, 303.

3. In an appeal in a suit between parties, for priority of lien and against an estate, one of the lien holders, on appeal, cannot object that the party obtaining judgment against the estate enforcing the vendors' lien, (for benefit of which the litigants were contending,) had not presented his claim to the administrator duly authenticated, when in such case the administrator had not appealed. *Watt v. White*, 338.

APPROVED.

CASES APPROVED.

EQUITABLE ESTOPPEL, 2.

1. *Flores v. Thorn*, 8 Tex., 381. *H. & G. N. R. R. Co. v. Jones*, 134.

2. *Glenn v. Shelburne*, 29 Tex., 125. *Kennedy v. McCoy*, 220.

3. *Monroe v. Arledge*, 23 Tex., 478. *Belcher v. Weaver*, 294.

APPROVED—*continued*.

4. *Burleson v. Burleson*, 28 Tex., 416; *Page v. Arnim*, 29 Tex.; *Johnson v. Byler*, 29 Tex., 610. *Mayor v. Ramsay*, 371.
5. *Hall v. McCormick*, 7 Tex., 278, 279. *Kerr v. Hutchins*, 384.
6. *Baldwin v. Peet, Sims & Co.*, 22 Tex., 708, and *Briscoe v. Bronaugh*, 1 Tex., 326. *Id.*
7. *Edgar v. The Galveston City Company*, 21 Tex., 302. *Edgar v. Galveston City Co.*, 421.
8. *Dunlap v. Wright*, 11 Tex., 603. *Masterson v. Cohen*, 520.
9. *H. & T. Central R. R. Co. v. Bradley*. *Price v. H. D. Nav. Co.*, 535.
10. *Towns v. Harris*, 13 Tex., 507; and *Young v. Smith*, 23 Tex., 600. *Hester v. Duprey*, 625.

ARREST OF JUDGMENT.

JUDGMENT, 3.

ASSESSMENT.

INJUNCTION, 1.

ASSIGNMENT OF ERROR.

PRACTICE IN SUPREME COURT.

1. When the assignment of errors points out no specific error, this court will not reverse, except for errors manifest in the record, going to the foundation of the action, or because the judgment appears to have resulted from manifest error, and to be in its effects too grossly inequitable to receive the sanction and approval of a court of justice. *Lumpkin v. Murrell*, 51.
2. When there is a conflict of testimony, the general assignment, that the verdict is against the law and the evidence, is too general, and will not be considered. *Norvell v. Phillips*, 162.
3. An assignment, that "the court erred in its charge," is too general to require attention. *Flanagan v. Boggess*, 330.
4. See assignments held indefinite. *Tompkins v. Toland*, 585.

ATTACHMENT.

FACT CASES, 2.

1. The fact that an affidavit for attachment was, by leave of the court, written upon the original petition after the defendant had answered, that the affidavit was not marked "filed," and that the petition was not refiled after the affidavit, are not serious objections to an attachment issued thereon. *Pinson v. Kirsh*, 26.
2. A plea in reconvention, alleging that the property seized was not the property of defendant, but that by its seizure the defendant was delayed in moving his family, put to additional expense, and that his family from the delay was exposed, and sickness was caused by the exposure, causing an outlay of money in medical bills, loss of time of defendant and of his family: *Held*, To show no cause of action. *Id.*

ATTACHMENT—*continued.*

3. In suit by attachment, when the wife's separate property is seized to secure a note made by the husband and wife, but on which the wife is not liable, she may recover the property, as any person might whose property had been illegally attached for the debt of another, by bringing suit or setting up her claim by cross-bill, under leave of the court, in the pending suit to which she had been made a party; and this she can do in her own name if her husband refuse to join her. *Wallace v. Finberg*, 36.

4. A defendant in attachment, whose goods have been seized under an attachment wrongfully sued out, is entitled to recover back all the goods not necessary to satisfy the debt, or their value, if sold, together with compensation for their detention, which would ordinarily be legal interest upon the value of the whole of the property seized from the time of the levy. If the plaintiff should fail to establish the debt, then the defendant should recover back all the property seized, or, if sold, its value at the time of the levy, with legal interest thereon. *Id.*

5. The deterioration in quality and the damages in the price of goods wrongfully seized under attachment, should be pleaded by a defendant specially, since they are not necessary results from an attachment, in order that the opposite party may be prepared, if he can, to meet the evidence offered to establish such contingent injury; and in a suit against husband and wife, where their defenses were conflicting, each asserting claim of ownership to the property seized, and the wife alone pleading special damage, the husband will not be entitled to recover on the special plea. *Id.*

6. A defendant, whose property has been wrongfully seized under attachment, may plead in reconvention his damage resulting from the malicious and oppressive abuse of the process of the court, by which his property was seized and detained, or he may rely on his statutory remedy, founded upon the law requiring a bond to be given by the plaintiff in attachment to secure against such damage as might be sustained by the wrongful suing out of the attachment. Under the first, exemplary damages may be recovered; under the latter, only actual damages. Such defenses should be presented as distinct causes of action or cross-action, with the averments respectively appropriate to each remedy, which are essentially different in the facts necessary to be averred. *Id.*

7. If an agent, who makes the affidavit and bond in an attachment proceeding, acts maliciously in doing it, he is responsible; but his malice will not be imputed by presumption to his principal, though his wrong judgment in suing out the writ would be. *Id.*

8. A judgment, in a proceeding by attachment, enforcing the attachment lien on land, is not conclusive of the defendant's homestead rights in the land attached, no issue regarding the homestead having been made by the pleadings. The effect of such a judgment is to enforce the attachment lien on whatever interest, subject at the

ATTACHMENT—*continued.*

time of the attachment to execution and forced sale, the defendant had in the land: the purpose of an attachment is, to hold the property on which it is levied, so that it may be subjected to execution so far as it is legally liable to execution, and no further. *Willis v. Matthews*, 479.

9. If the plaintiff in attachment desires to have the question of his homestead right in property attached, settled, in the attachment suit, he should make such amendments to his pleadings as will give the defendant notice that he is called upon to defend his homestead rights; and on principle it would seem that his failure to assert such rights, would be an admission that he had none. *Id.*

ATTORNEY.**PRACTICE IN DISTRICT COURT, 10.**

Although an attorney at law, as such, has, strictly speaking, no right to make a compromise, yet a court will be disinclined to disturb one, which was not so unreasonable in itself as to be exclaimed against by all, and to create the impression that the attorney's judgment had been imposed upon, or not fairly exercised. The conduct of the party seeking to be relieved against his attorney should have been perfectly blameless. *Roller v. Wool-dridge*, 485.

ATTORNEYS' FEES.

1. Reasonable attorneys' fees for necessary service actually rendered in an estate, form part of the expenses of administration. *Gammage v. Rather*, 105.

2. If the attorney looks to the estate for payment of his fees, his claim must be authenticated by affidavit, and presented for approval as other debts of the estate. *Id.*

3. If payment of such fees be exacted of the administrator, then such expense will form an item in his account, and will be allowed as such, on a proper showing, in his settlement. *Id.*

4. The administrator, in paying such fees, may authorize the appropriation to that use of money to be collected for the estate by the attorney to whom such fees are due. *Id.*

5. An administrator sought, by motion against a law firm, to recover money collected by them, belonging to the estate. The defendants set up their services for the estate, rendered over two years before, and that they were authorized to appropriate the funds collected to the satisfaction of their claims: *Held*, Error to sustain exceptions to the plea, on the ground of the statute of limitation. *Id.*

AUDITOR.**PRACTICE, 4.****TRIAL BY JURY, 1.**

A party has a right to specially object to any item allowed by, or disallowed, or to any conclusion arrived at, by an auditor, as exhib-

AUDITOR—*continued.*

ited in his report, and have the verdict of a jury thereon in response to evidence adduced on the trial of the case. In the absence of such objections, it is not error for the court to charge, that the report of the auditor is conclusive, nor does such practice contravene the right of the party to a trial by jury. *Boggs v. The State*, 10.

AUTHENTICATION.

ATTORNEYS' FEES, 2.

1. The certificate of an officer to the privy examination of a married woman who, with her husband, signs a deed, which certificate recites that the wife acknowledged in her privy examination that she signed the deed "without any bribe, threat, or compulsion" from her husband, is sufficient if good in other respects. The words used are construed as equivalent to a declaration by the wife that she signed the deed freely and willingly, and negative the exercise of any improper influence or duress by the husband. *Belcher v. Weaver*, 293.

2. An instrument on which suit was brought against the county of Leon, was headed as follows: "Pay-roll of special policemen, county of Leon, Texas." Under this was written twenty names of persons, with figures and amounts following each name, as follows, the other nineteen being similar, viz: "John Rose, from September 15, 1871, to October 6, 1871, (19 days,) \$57." Under this instrument, the following certificate: "I certify that the above pay-roll of special policemen of Leon county is correct and just, and that they have performed duty for the number of days specified. A. West, registrar. Approved: James Davidson, ad't gen'l and chief of police, State of Texas:" *Held*, That such instrument could not be made the basis of a recovery against Leon county, under the act of May 2, 1871. (Paschal's Dig., art. 7212.) *Leon Co. v. Houston*, 575.

BAILEE.

Where a bailee took possession of "a crib of corn," at the request of the bailor, and for his benefit, the measure of damages on the bailee for using it would be the value when taken, with interest. *Masterson v. Goodlett*, 402.

BANKRUPTCY.

WRIT OF ERROR BOND.

1. In a suit for damage against an officer for seizing property, claimed as belonging to the estate of a party against whom proceedings in bankruptcy were taken, and where there is evidence tending to show that the goods seized had been conveyed by the bankrupt in violation of the provisions of the bankrupt law, it is error to refuse instructions asked by the defendant, informing the jury of the terms and provisions of the bankrupt law, apparently violated by the bankrupt, as to the goods so seized. *Purnell v. Gandy*, 190.

2. In such a suit, it was error to refuse, when asked to instruct, the substance of section 35 of the bankrupt act. *Id.*

BANKS.**CORPORATIONS, 1.**

The act of June 3, 1873, (13 Leg., 204, 205,) requires the assessment for taxation of "any shares or stock in any banking company or corporation." The word "share" and "stock" are used as synonymous, and each corporator is required to give in for taxation the part or portion of the capital or capital stock of the corporation, or association, he owns. *Harrison v. Vines*, 15.

BILL OF EXCEPTION.**PRACTICE IN SUPREME COURT.**

1. When, by the bill of exceptions, it is not shown that the testimony was, under no circumstances, admissible, the court will suppose that the court below would have made the proper ruling, had the objection been insisted on to the testimony, so far as it seems objectionable. *Norvell v. Phillips*, 162.

2. Where the exclusion of testimony is claimed to be erroneous, the party injured should show, by bill of exceptions, what objections were made to the testimony, and why it was excluded. *Flanagan v. Boggess*, 331.

BILL OF REVIEW.**PLEADING, 15.****BONA FIDE PURCHASER.****PURCHASER.****VENDOR AND VENDEE.**

A levy upon lands under an execution fixes a lien, which upon sale under the execution, or *venditioni exponas*, passes title against an unrecorded deed; nor is the title effected by notice after the levy and before the sale. *Borden v. McRae*, 397.

BOND.**SEAL.****BONDHOLDER.****PARTIES, 7.****BOUNDARY.****SURVEY.**

Two deeds executed at the same time, by the same vendor, each calling for the line of the other as a division line, and calling for land within, but on opposite sides of the same survey, will be held to convey the entire tract, whether it be greater or less in quantity than estimated. *Sellers v. Reed*, 377.

BURDEN OF PROOF.

The fact that a plaintiff, who has caused goods to be seized under a writ of sequestration, has established his debt and the validity of a

BURDEN OF PROOF—*continued*.

written lien, by which he was authorized to take possession of and sell the mortgaged goods in the event his debt was not paid, does not preclude the defendant from showing that the suing out of the writ was wrongful, by negating, on the trial, the truth of the grounds on which it was issued; but it is incumbent on the defendant to make out by evidence a *prima facie* case that the suing out of the writ was wrongful, before the plaintiff can be required to disprove it. *Harris v. Finberg*, 80.

CALLS.

Where from actual corners, lines not marked are run by course and distance, and a stream is found where called for, but of a different name from that called for in the field-notes, it may be inferred that the call for the stream was a mistake, and to that extent course and distance would be regarded, instead of the call for a stream elsewhere made in the field-notes. *Jones v. Burgett*, 284.

CASES APPROVED.

APPROVED.

1. *Rogers v. Ragland*, 42 Tex., 422. *Hendrix v. Hendrix*, 6.
2. *Grace v. Wade & Mains*, 35 Tex., 522, approved. *Borden v. McRae*, 397.
3. *Dorn v. Dunham*, 24 Tex., 380, and *Sartain v. Hamilton*, 12 Tex., 222. *Hutchins v. Bacon*, 408.
4. *Davenport v. Hervey*, 30 Tex., 330; *Hutchinson v. Owen*; 20 Tex., 288; *Reynolds v. Dechaumes*, 22 Tex. 119. *Hunt v. Askeu*, 247.

CASES DISCUSSED.

DISCUSSED.

1. *Haldeman v. Chambers*, 19 Tex., 52; *Clardy v. Callicoate*, 24 Tex., 173; *Portier v. Fernandez*, 35 Tex., 535; *Seiling v. Gunderman*, 35 Tex., 545; *Stetson v. Le Blanc*, 6 La., O. S., 270; *Littlejohn v. Wilcox*, 2 La. Ann., 620; 21 Ala., N. S., 496; 8 B. Monr., 51-160; *Kirkey v. Jones*, 7 Ala., 622. *Harris v. Finberg*, 80.
2. *Watts v. White, Smith & Baldwin*, 33 Tex., 421, and *White, Smith & Baldwin v. Downs*, 40 Tex., 225. *Watt v. White*, 338.
3. This case distinguished from *Hamilton v. Van Hook*, 26 Tex., 305. *Masterson v. Goodlett*, 403.

CASES DISTINGUISHED.

DISTINGUISHED.

CAUSE OF ACTION.

ACTION.

PARTIES, 11.

1. The voluntary labor and expenditure by a city upon a work,

PRACTICE, 3.

PUBLIC OFFICER, 1.

CAUSE OF ACTION—*continued.*

the performance of which, by the railroad company, had been released, without calling upon the company to do the work, will not sustain an action, by the city, for labor and expenditure which were voluntary, even if the release by the city was without consideration. *Galveston v. G. C. R. R. Co.*, 435.

2. If a contract has been obtained by mistake, or if through change of circumstances it is deemed to operate oppressively, an agreement to make an additional compensation, or to annul or modify it, is not invalid for want of consideration. *Id.*

CERTIFICATE.

The certificate given by the clerk, on the oath of a witness, showing the amount due him for attendance on a cause, is not an adjudication any more than the taxing of costs in the fee-book would be, but they are both modes, prescribed by law, for the authentication of a claim, which is *prima facie* evidence of its correctness, when done, upon which suit may be brought against the party who summoned him, without waiting for the termination of the suit. If the party who procured the witness to be summoned should pay his certificate, the possession of it, receipted, would be evidence of his right to receive the money when collected from the party against whom the judgment for costs is rendered. *H. & G. N. R. R. Co. v. Jones*, 133.

CERTIFICATE OF ACKNOWLEDGMENT.

MARRIED WOMAN, 6, 7, 8.

A certificate of acknowledgment of a notary public, beginning "The State of Texas, county of Hopkins," which recites the appearance of the parties before the "undersigned authority," and closes as follows, viz: "witness my hand and official seal, at Douglass, this 6th day of October, A. D. 1854, (signed) John B. Clute, Notary Public, N. C.," and in other respects formal, is good; the discrepancy between the county named in the outset and the initial letters appended to his signature is not of sufficient importance to invalidate the record. *Blythe v. Houston*, 67.

CHANGE OF VENUE.

1. In October, 1876, an order was made by the district judge in Kaufman county, to transfer a cause which the presiding judge was disqualified from trying, to the county of Van Zandt. The district clerk of Kaufman county refused to make out a transcript of the entries and decrees in the case, and to forward them, together with the original papers in the cause, to Van Zandt county, as required by the order. On appeal by the plaintiff from the judgment of the District Court, refusing to award a *mandamus* against the clerk to compel a transfer of the papers in the cause: *Held*—

1. That the disqualification of the district judge is not, under the present Constitution, a cause for a change of venue.

CHANGE OF VENUE—*continued.*

2. When a district judge is disqualified, a special judge must be provided, as required by the act of 1876, (General Laws, sec. 3, p. 141.)

3. The act of 1854, which provided for a change of venue when a district judge was disqualified, cannot be upheld as a law now in force by sec. 45, art. 3 of the Constitution of 1876, which provides that "the power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law, and the Legislature shall pass laws for that purpose;" that section, as well as that part of section 56 in the same article which prohibits a special law changing the venue in civil or criminal cases, is designed as a limitation on the legislative power, and to require that a change of venue shall be a judicial act under a general law prescribed for that purpose.

4. That the writ of *mandamus* was properly refused. *Murray v. Broughton*, 351.

2. The remedy given to claimants of an estate to bring suit for its recovery, in the county where the letters of administration were issued, (Paschal's Dig., art. 1354,) is subject to the right of either party to have the venue changed, for any cause provided by the general law governing changes of venue. *Treasurer v. Wygall*, 447.

3. In May, 1871, the Legislature passed an act providing for the change of venue, from Fort Bend county to Travis county, of a case against the State treasurer, involving the ownership of assets turned over to the treasurer, under the laws relating to the administration of the estates of deceased persons. The administration was closed in Wharton county, where the suit was begun, which was afterwards removed, by change of venue, under pre-existing law, to Fort Bend county, in April, 1871: *Held*—

1. That the suit, being against the State treasurer in his official, and not in his individual capacity, was in effect a suit against the State, which had been permitted under a statute applicable to it; and that the Legislature had power to protect the interests of the State, by requiring the particular suit, and all others of like character, to be removed to the District Court, at the State capital, in Travis county, where the interests of the State could be more conveniently protected.

2. Though the exercise of a legislative power, thus to provide for a change of venue after suit brought, might be used oppressively, the lack of such a power might result in the perpetration of the most flagrant injustice.

3. Where the State has, under her laws, assumed a trust in the custody of an estate not claimed by heirs, and the general rules prescribed for the administration of the trust in any particular case are inadequate, the State, by its Legislature, has power, commensurate with its assumed duties and responsibilities, to make the remedy complete, by special law, if necessary, for the protec-

CHANGE OF VENUE—*continued*.

tion of the just rights of others, or the security of its own in the trust property.

4. Property of an estate thus turned over to the State treasurer by an administrator, occupies the same position as property that has been escheated to the State; and in either case, it may be sued for under the permission of the laws.

5. In such a suit, the State is substantially a party, and can be sued only on its own terms, whether prescribed generally or specially; the Legislature is not limited in prescribing the terms, unless some constitutional limitation of its power exists, prohibiting it from passing the particular law for the protection of the State.

6. The act of 1870, relating to the estates of deceased persons, being prospective in its operation, though it did not authorize a suit against the State treasurer to recover assets turned over to him, when the heirs were unknown, as was done by the act of 1848, yet it did not have the effect to abate a suit properly brought for such a purpose before the act of 1870 was passed. The right to bring such a suit, once having been conferred, could not, after the institution of the suit under the act of 1848, be taken away, without the violation of a vested right in the heirs or distributees.
Id.

CHARGE OF THE COURT.

LAND, 5.

NEGLIGENCE, 2, 3, 5, 6.

PRACTICE IN DISTRICT
COURTS.

PRACTICE IN SUPREME COURT,
19.

RAILWAY COMPANY, 7.
SURVEY, 9.

1. See discussion of charges improperly allowed in a suit by the children of deceased wife against the estate of the surviving husband—rents, hire of slaves, interest, &c. *Lumpkin v. Murrell*, 51.

2. In such suit it was error to instruct the jury that both plaintiff, who claimed under the purchase under decree enforcing the vendors' lien, and the defendant, holding by purchase of vendee before suit, held under the original vendee; and that defendant, not being party to the suit enforcing the lien, was on that account entitled to recover. *Peters v. Clements*, 115.

3. A charge not applicable to the facts in evidence is properly refused, however correct as a principle it may be. *Norvell v. Phillips*, 161.

4. In a suit for damage against an officer for seizing property, claimed as belonging to the estate of a party against whom proceedings in bankruptcy were taken, and where there is evidence tending to show that the goods seized had been conveyed by the bankrupt in violation of the provisions of the bankrupt law, it is error to refuse instructions asked by the defendant, informing the jury of the terms and provisions of the bankrupt law, apparently violated by the bankrupt, as to the goods so seized. *Purnell v. Gandy*, 190.

CHARGE OF THE COURT—*continued*.

5. In such a suit, it was error to refuse, when asked to instruct, the substance of section 35 of the bankrupt act. *Id.*

6. See case where judge, after instructing the jury to regard calls, 1st, natural objects; 2d, artificial marks; and 3d, course and distance, "that neither of these should absolutely control the others when that other most truly indicates to the minds of the jury the proper locality of the tract." *Jones v. Burgett*, 285.

7. There is no rule of law which makes a call for a natural object, under all circumstances, the controlling call, so as to preclude the consideration of other evidence as to the true locality of the land. *Id.*

8. The fact that lines of a survey were not actually run, will not invalidate a patent, provided the land can be identified with reasonable certainty; and where lines were not run, a mistake in a call for a river might occur, which, if made in a survey actually run, would be difficult to explain. *Id.*

9. That a surveyor adopted field-notes of a former survey, which were incorrect, however evidencing dereliction of duty in the surveyor, would not affect the validity of a patent upon such defective survey. *Id.*

10. A charge, assuming a fact not in evidence is properly refused by the court. *Flanagan v. Boggess*, 330.

11. Article 1464, Paschal's Dig., is mandatory and peremptory. It leaves no discretion to the judge as to whether or not he shall "charge or comment on the weight of evidence," or as to whether or not he shall "submit questions of fact solely to the jury;" but in his charge, questions of law must be separated from questions of fact, and the latter be decided by the jury alone. The statute presumes that the jury is as competent to decide questions of fact as the judge is to determine questions of law. *T. & P. R. W. Co. v. Murphy*, 356.

12. Acts of negligence may be of a character so extreme and so clearly established by uncontradicted evidence that this court would not on appeal disturb a verdict rendered on a charge in which the court below had departed from the statute and instructed the jury that such acts constituted negligence; but in such case it must appear manifest that he who complains of the charge had not been injured by it. *Id.*

13. In a suit to set aside a mortgage as fraudulent, the facts being established that the party charged with the fraud was largely indebted, at the time the mortgage was made, to various creditors, and mortgaged to one creditor "the mass" of his property, leaving not enough to satisfy the demands of other creditors, does not authorize the court to charge that such facts constituted fraud in law. It is the province of the jury, and not of the court, to draw the inference of fraud from such facts. *Kerr v. Hutchins*, 385.

14. A charge given upon a hypothesis not warranted by the testimony, is error. *Hutchins v. Masterson*, 551.

CHARTER.

SUBSCRIPTION, 2.

CITATION.

The sheriff's return on a citation to J. W. Hendon, the defendant in this suit, was as follows: "Came to hand January 21, 1876, and executed same day by delivering to J. N. Hendon in person a true copy of the written citation, together with a certified copy of plaintiff's original petition:" *Held*, That it failed to show with reasonable certainty that the citation was served on the defendant in the suit, and no judgment by default could be rendered against the defendant. *Hendon v. Pugh*, 211.

CITY—CITY CHARTER.

ACTION, 1, 2.

CLAIMS AGAINST ESTATES.

ESTATES OF DECEDENTS, 2, 3, 4.

1. In an appeal in a suit between parties, for priority of lien and against an estate, one of the lien holders, on appeal, cannot object that the party obtaining judgment against the estate enforcing the vendors' lien, (for benefit of which the litigants were contending,) had not presented his claim to the administrator duly authenticated, when in such case the administrator had not appealed. *Watt v. White*, 338.

2. The holder of a note secured by a vendors' lien and indorsed by the payee, who has since died, is not required to present the claim to the administrator of the indorser before enforcing the vendors' lien against the estate of the original maker of the note; if it would advantage the estate of the indorser to have the claim against the maker, he should have taken up the note, whether presented or not. *Id.*

COLLATERAL PROCEEDING.

ADMINISTRATION, 4.

ESTATES OF DECEDENTS, 9.

COLONIZATION LAWS.

1. The colonization law of March 24, 1825, did not prohibit a conveyance of land acquired by a colonist, after the expiration of six years from the date of the colonist's title. *Thomas v. Moore*, 433.

2. A colonist, who acquired land as such, under the colonization law of 1823, was permitted to alienate the same at any time after receiving the grant. *Id.*

COMMUNITY PROPERTY.

1. It seems that the surviving husband, who has kept control of and has managed the community property after the death of the wife

COMMUNITY PROPERTY—*continued*.

should not be charged with the wrongful conversion of such property in a suit by the heirs of the wife, such possession being lawful, and his liability being only as trustee. *Lumpkin v. Murrell*, 51.

2. The statute of August 26, 1857, (Paschal's Dig., 4647-49,) seems to have been intended as a privilege and not as a limitation upon the rights of the surviving husband. If he fails to avail himself of it, he may be held to a stricter accountability than that imposed by the statute, in the settlement with those jointly interested with him in the property. *Id.*

3. To settle on just and equitable principles the rights of the children of a former marriage, claiming in right of their mother against the children of a second marriage, and some of the children claiming under a will of the surviving husband, an account should be taken between the estate and heirs of the first wife, and that belonging to such heirs partitioned among them; as to the residue, the legatees should have the privilege of electing whether they will take as heirs or legatees. *Id.*

COMPROMISE.

Although an attorney at law, as such, has, strictly speaking, no right to make a compromise, yet a court will be disinclined to disturb one, which was not so unreasonable in itself as to be exclaimed against by all, and to create the impression that the attorney's judgment had been imposed upon, or not fairly exercised. The conduct of the party seeking to be relieved against his attorney should have been perfectly blameless. *Roller v. Wooldridge*, 485.

CONFEDERATE MONEY.**CONFISCATION LAWS.****CONTRACT**, 4, 5, 6.**PRINCIPAL AND AGENT**, 7.**TENDER.**

The court will take notice of the absence of money, other than Confederate bills or notes, during the Confederate war; and will not allow for rents, interest, hire, &c., against a trustee, without proof that they were actually received during that period, and by the trustee. *Lumpkin v. Murrell*, 52.

CONFEDERATE WAR.

It is a rule of international law, that war suspends, for the time, all friendly intercourse between citizens of hostile States; that, while it continues, no kind of business or commercial intercourse can be legitimately transacted by citizens of the one with those of the other; it dissolves commercial partnerships, at the breaking out of hostilities, between citizens of the States in conflict, and revokes the authority of agents in regard to transactions not agreed upon and in part executed. But war does not suspend authority for the collection of a debt, given previous to the beginning of hostilities, by a citizen of one of the hostile States, to an agent, who, as well as the debtor, resides in the other. *Rodgers v. Bass*, 506.

CONFISCATION LAWS.

TENDER.

CONSIDERATION.

DESCRIPTION, 3.

GRANT, 3, 5.

EVIDENCE, 6.

MUNICIPAL CORPORATION, 4.

A loan of Confederate States treasury notes constituted a valuable consideration upon which to sustain a contract. *Roller v. Wool-dridge*, 485.

CONSTABLE.

EXECUTION, 2.

CONSTITUTIONAL LAW.

JURISDICTION, 1.

CONSTRUCTION.

CALLS, 1.

CHARGE OF COURT, 7, 8.

MARRIED WOMAN, 6, 7, 8.

1. Two deeds executed at the same time, by the same vendor, each calling for the line of the other as a division line, and calling for land within, but on opposite sides of the same survey, will be held to convey the entire tract, whether it be greater or less in quantity than estimated. *Sellers v. Reed*, 377.

2. Such excess must be divided between the two in proportion to the quantity owned by each, irrespective of values, in the absence of facts showing that equity would require the application of a different rule. *Id.*

3. The price paid by the parties is not the measure by which the excess should be apportioned. *Id.*

4. "A crib of corn" is an indefinite quantity, not merely because the capacity of the crib is not stated, but because the expression, in common usage, does not mean a crib full of corn. *Masterson v. Goodlett*, 402.

5. An obligation by the railroad company, that it "shall at all times keep the road-bed of said railroad in good repair, and shall keep said road-bed up to the level of the streets; in no case shall said road-bed be above or below the city grade of the streets, after said streets shall have been graded by the city,"—does not oblige the railroad company to fill up the streets beneath its track, so as to keep its road-bed on a level with the street on each side of the track. *Galeston v. G. C. R. R. Co.*, 435.

6. Such obligation merely required the road to be kept in good repair, and did not bind the company to contribute to the expense of grading the streets, but merely to conform to and keep the level of the road-bed to that of the streets, when graded. *Id.*

7. When an instrument is drawn in the form of a deed, and delivered as such, couched in appropriate language to indicate its

CONSTRUCTION—*continued.*

purpose and have effect as such, the court will not, by construction, give it a different effect. *Hart v. Rust*, 556.

8. An instrument made and delivered by a father to a son, purporting to convey lands and other property to a minor son, in carrying out a partition of the greater part of the father's estate between the minor and a married sister, to whom a like share had been at the same time conveyed, and providing that the parents, or the survivor, shall have the possession during life, and in event of the death of the grantee without issue, and made at the same time that a will was written and signed, will not be construed, as between the grantee and the legal representatives of the father, to be a will, but will be held, as between such parties, a deed. *Id.*

9. Nor will the fact that sufficient property was not retained by the grantee, invalidate such a conveyance, as between the grantee and the legal representatives of the grantor. *Id.*

10. Only creditors or purchasers without notice of such deed, or parties holding under such, could attack the deed. *Id.*

11. A direct proceeding on the part of creditors, or for their use, would be required to reach the estate, conveyed by such deed, by having the conveyance annulled. *Id.*

12. B. died in 1862, leaving a will, in which he made his three children, his executors and equal heirs. He gave, however, to his son D. a negro, in addition to his otherwise equal share, to compensate him for maintaining E. B., a deaf brother of the testator. In the next clause of the will, he expressed the wish that his son D. would take especial care of E. B. during the latter's life; and if his son D. should die before his brother, E. B., he desired that his other two children, E. L. and M. D., should take charge of and provide for his brother, E. B., while he lived. The remaining clause of the will provided, "it is my wish that my homestead and five hundred and fifty-nine acres of land, with the improvements thereto attached, shall be set apart to my son D., extra of his interest in the remaining portion of my estate, in consideration of the landed interest already given to my other children, and as a compensation for maintaining of my brother E. B. as aforesaid." Suit was brought by E. B., for the rents and profits of the homestead, in which it was claimed that it was charged in the hands of the legatees with the support and maintenance of E. B., during his natural life: *Held*—

1. The will, properly construed, must be regarded as conveying the testator's desire for the maintenance and support of his brother E. B., as he had been previously provided for by the testator himself.

2. It was the intention, that E. B. should be provided for as a member of the family, without imposing a pecuniary burden on the heirs, in the shape of a charge or incumbrance on the estate, or of limiting the support of E. B. to any specific amount.

CONSTRUCTION—*continued*.

3. If E. B. left the homes of the heirs, provided for him in the will, without their fault, they would not become liable for an amount sufficient to support him elsewhere.

4. A judgment making an annual allowance of a stated sum of money for E. B. in the future, and giving him money for his estimated expenses in the past, while living away from the heirs, was erroneous. *Lynn v. Busby*, 600.

CONSTRUCTION OF STATUTES.

COUNTY SEAT, 1.

SHERIFF AND SHERIFF'S SALE.

STATUTES CONSTRUED.

Article 4178, Paschal's Dig., authorized the issuance of the unconditional certificate to the "widow's legal heirs, executors, or administrators," &c.: *Held*, That under this statute, the heirs, executors, and administrators alike stood as representatives of the deceased, and not in their own right. *Marks v. Hill*, 345.

CONTRACT.

CAUSE OF ACTION, 2.

PARTNERSHIP, 1.

MEASURE OF DAMAGES, 4.

VENDOR AND VENDEE, 17.

MUNICIPAL CORPORATION, 4.

1. A contract, after performance, is effectual in support of payment under a plea of innocent purchaser. *Peters v. Clements*, 114.

2. An obligation by the railroad company that it "shall at all times keep the road-bed of said railroad in good repair, and shall keep said road-bed up to the level of the streets; in no case shall said road-bed be above or below the city grade of the streets, after said streets shall have been graded by the city,"—does not oblige the railroad company to fill up the streets beneath its track, so as to keep its road-bed on a level with the street on each side of the track. *Galveston v. G. C. R. R. Co.*, 435.

3. Such obligation merely required the road to be kept in good repair, and did not bind the company to contribute to the expense of grading the streets, but merely to conform to and keep the level of the road-bed to that of the streets, when graded. *Id.*

4. A loan of Confederate States treasury notes constituted a valuable consideration upon which to sustain a contract. *Roller v. Wooldridge*, 485.

5. The use of Confederate States notes in private transactions between parties, where it circulated, did not affect such transactions with any taint of illegality or fraud. Within the Confederacy, it was the only circulating medium, and was generally received and passed as money, or token of value, by which debts were paid and exchanges effected. *Rodgers v. Bass*, 505.

6. Neither executory or executed contracts can be held illegal or void because based on Confederate States treasury notes, and,

CONTRACT—continued.

where of importance in adjudicating such contracts, its value at the time and place where the contract was made should be shown, and the effect of payments and investments in it, by agents, representatives, and trustees, must depend in the main upon the facts and circumstances of each particular transaction. *Id.*

CONVERSION.

1. There is no rule by which one can be held to have converted property to his own use and still hold it in trust for the owner. The owner may have the right to elect whether he will sue for tort or bring his bill for an account, but it would be inequitable for him to do both. *Lumpkin v. Murrell*, 51.

2. It seems that the surviving husband, who has kept control of and has managed the community property after the death of the wife, should not be charged with the wrongful conversion of such property in a suit by the heirs of the wife, such possession being lawful, and his liability being only as trustee. *Id.*

CORPORATIONS.**DAMAGES, 9.****RAILWAY COMPANY, 2, 3.****EXEMPLARY DAMAGE, 1. STOCK, 1, 2.**

1. It is well settled that shares of banking associations authorized by the act of Congress of June 3, 1864, "To provide a national currency," in the hands of the shareholders, are liable to taxation by the States, within the limitations set forth in said act, although the capital of such bank is invested in national securities declared by said act as "exempt from taxation by or under State authority." *Harrison v. Vines*, 15.

2. The act of June 3, 1873, (13 Leg., 204, 205,) requires the assessment for taxation of "any shares or stock in any banking company or corporation." The word "share" and "stock" are used as synonymous, and each corporator is required to give in for taxation the part or portion of the capital or capital stock of the corporation, or association, he owns. *Id.*

3. It is not necessary that it be embodied in the State law imposing such a tax, that it is not greater than that levied upon capital in the hands of individual citizens, or upon the shares of banks organized by the State laws. It is sufficient that such law in fact does not violate those provisions of the national currency act. *Id.*

COSTS.

1. The amount due each witness for attendance in a suit, should be separately taxed, and thus carried into the bill of costs accompanying the execution, so as to give the defendant each item of costs he is required to pay. *H. & G. N. R. R. Co. v. Jones*, 133.

2. The certificate given by the clerk, on the oath of a witness, showing the amount due him for attendance on a cause, is not an

COSTS—*continued*.

adjudication any more than the taxing of costs in the fee-book would be, but they are both modes, prescribed by law, for the authentication of a claim, which is *prima facie* evidence of its correctness, when done, upon which suit may be brought against the party who summoned him, without waiting for the termination of the suit. If the party who procured the witness to be summoned should pay his certificate, the possession of it, receipted, would be evidence of his right to receive the money when collected from the party against whom the judgment for costs is rendered. *Id.*

3. At a term of court, after judgment, the court, on motion of the party against whom costs had been adjudged, ordered a retaxation of the costs, excluding certain witness fees for informality of taxation; the costs were immediately paid to the clerk as retaxed; after this, during the same term, the costs were, on motion, again adjudged to be retaxed, so as to include the witness fees, the informality of the first taxation having been cured by the affidavits of the witnesses and the clerk's certificate. There was no effort made to show that the charges of the witnesses were excessive or unfounded: *Held*, That the payment of the costs under the first order did not preclude the subsequent judgment, which must be held, in the absence of testimony contradicting the clerk's certificate and the affidavits of the witnesses, to be correct. *Id.*

4. The letter of the statute (Paschal's Dig., 1500, authorizes the dismissal of the case when a rule has been regularly entered requiring the plaintiff to give security for costs, if the security is not given on or before the first day of the next term after the rule. By a liberal construction of the statute, it is held that the rule may be complied with after the first day, if done before the case is dismissed. *Cook v. Ross*, 263.

COUNTY BONDS.

1. County bonds must be treated as commercial paper, and their holders entitled to the privileges and immunities attaching to negotiable instruments. They are not, therefore, within the rule of *lis pendens*. *Board v. T. & P. R. W. Co.*, 317.

COUNTY COURT.

1. Under the act of March 20, 1848, regulating proceedings in the County Court, the owner of notes, secured by mortgage on the property of an estate, could enforce his lien in the County Court, and in no other court, unless there was some good ground for invoking the jurisdiction of the District Court. *Cannon v. McDaniel*, 304.

2. As the statute has required the application to remove a county seat, to be made to the County Court, and they are to determine whether it has been made by a majority of the registered voters of the county, and to order the election and give notice thereof, it may

COUNTY COURT—*continued.*

be inferred that the Legislature intended to confide to the County Court the investigation and determination of all the other facts necessary to a fair and legal election. *Worsham v. Richards*, 441.

3. The members of the County Court must be organized as a court, under the law, before their conclusions can be received and acted on as the judgment of the court. *Id.*

COUNTY SEAT.

1. As the statute has required the application to remove a county seat, to be made to the County Court, and they are to determine whether it has been made by a majority of the registered voters of the county, and to order the election and give notice thereof, it may be inferred that the Legislature intended to confide to the County Court the investigation and determination of all the other facts necessary to a fair and legal election. *Worsham v. Richards*, 441.

2. The citizens of a county have no such legal right, in the locality of a county seat, as will enable them to bring a suit to prevent a change of it by the authorities appointed by law to act on that subject. *Id.*

COURT.

JUDGMENT, 6.

CREDITORS.

CONSTRUCTION, 10, 11.

CROSS-BILL.

ATTACHMENT, 3.

DAMAGES.

ATTACHMENT, 2, 6, 7.

EVIDENCE, 5.

EXEMPLARY DAMAGES, 1.

MEASURE OF DAMAGES, 3.

SEQUESTRATION.

1. See statement of the case for damages which are not the natural, proximate consequence or legal result of the seizure of property by attachment, and held to be too remote to be the basis for a recovery. *Pinson v. Kirsh*, 26.

2. Whilst courts should be slow to interfere with the verdict of a jury on a claim for damages, when the measure of damages is indefinite, they should not hesitate to do so when the error in the verdict is manifest. *Darcy v. Turner*, 30.

3. See facts stated in the opinion, which were held insufficient to authorize the verdict on a claim for damages for wrongful suing out of an attachment. *Id.*

4. The liability of a sheriff and his sureties to pay ten per cent. per month on the amount collected by him under execution, and which he fails, after demand, to pay over to the party entitled to receive

DAMAGES—*continued*.

it, can be enforced in no other way than by motion. *Scogins v. Perry*, 111.

5. It may be questioned whether a party can, at his mere option, and without excuse for delay, allow several terms of court to pass, and then claim the heavily-accumulated penalty of ten per cent. per month from the date of such failure. *Id.*

6. A suit may be maintained in the District Court for damages for the wrongful and malicious levy of a writ of sequestration, when the amount claimed exceeds the jurisdiction of the magistrate; and this, though the judgment of the magistrate ordering that the property seized should be sold, stands in full force and not appealed from. *Rountree v. Walker*, 200.

7. In a suit for damages, claimed for the wrongful and malicious suing out and levying a writ of sequestration, the plaintiff should plead, and show what affidavit was made by the defendant to obtain the writ, and negative the truth of it. If no such affidavit was made, that fact should be stated, and that the writ was issued at the instance of the defendant. *Id.*

8. No recovery can be had against an officer for malicious use of process, who, when directed by a magistrate, levies a writ of sequestration on property, unless it is alleged and proved that he conspired with or instigated the plaintiff in the malicious issuing and levy of the writ. *Id.*

9. The actual damages to which a railroad company must respond, extending as it does to injuries to the feelings, and damage for personal suffering, gives to juries sufficient scope, without allowing exemplary damages, except in cases when the corporation has itself been remiss. *Hays v. H. G. N. R. R. Co.*, 272.

10. If the malicious act of its agent is ratified and adopted by a railroad company; if there is carelessness in the selection of employees, or in the establishment of appropriate regulations; if, in short, the corporation or other officers by whom it is controlled and represented are guilty of some "fraud, malice, gross negligence or oppression,"—the law will hold the company liable to exemplary damages, but not otherwise. *Id.*

11. The Texas and Pacific Railway Company was liable for damages caused by the Southern Pacific Railway Company prior to the 21st of March, 1872, the date when the consolidation of said companies was effected in pursuance of legislative enactment. *T. and P. R. W. Co. v. Murphy*, 356.

12. No action for damage can be maintained against a municipal corporation, such as a town or city, to which the "exclusive control and power over its streets, alleys, and public grounds and highways" is given by its charter, by a party who has suffered an injury occasioned through want of repair of its streets.. *City of Nava-sota v. Pearce*, 525.

13. But where the privileges given in a charter, are granted either

DAMAGES—*continued.*

upon an express or implied condition of corporate responsibility to individuals who suffer damage through the neglect of their performance of duty, or when the charter confers some franchise or privilege, from which profit may be made, apart from its governmental powers, and which might have been granted to a private corporation or an individual, an action may be maintained for damage sustained from a breach of such condition, or through the negligent or improper exercise of the rights conferred by such franchise. *Id.*

14. It is universally admitted that an individual action, unless authorized by statute, cannot be maintained against counties, parishes, or commissioners of highways, for damages sustained through their neglect to keep their bridges and highways in repair, although the duty of doing so is clearly enjoined upon them by law, and they have authority to collect taxes, and make adequate assessments to that end. The establishing and maintaining a highway is a matter of State duty, and whether its discharge is intrusted to the county, street commissioners, or a municipal corporation, by its charter, is immaterial; the right to recover damage for injury sustained by the neglect of duty by either, in keeping a highway in repair, does not exist. *Id.*

15. Plaintiff sued for damages, for the loss of his horse and injury to his buggy, occasioned by the negligence of the city of Navasota in keeping its streets in repair. The horse fell in harness, rolled into a ditch, was killed in the affair, and the buggy broken: *Held*, That no action lay against the city. *Id.*

16. There is no such liability by statute, and the decision is based upon the rule at common law. *Id.*

17. The act of February 2, 1860, (Paschal's Dig. 15, 16,) authorizing the heirs, &c., to bring suit where the injured party could, himself, have maintained an action for injury occasioned by the negligent, culpable or wrongful act of another, was not repealed by sec. 30 of art. 12 of the Constitution of 1869. *Price v. H. D. N. Co.*, 535.

18. The master is not liable for injuries sustained by his servant through the negligence or default of a fellow-servant. *Id.*

19. For damage to the property of an estate, by its wrongful seizure, under a writ of sequestration, an action lies. The fact that the petition contains allegations of wrong to the representative of the estate, will not affect the right of such representative to sue for the injury to the property in course of administration. *Tompkins v. Toland*, 584.

20. Decline in the price of cotton, after a sequestration levied upon cotton has been dismissed, and the cotton restored, cannot, in a suit for damages for seizure of such cotton, be charged to the plaintiff in the sequestration suit; nor is loss from improper handling of such cotton, after it was replevied by defendant, to be charged to the plaintiff. *Id.*

DEBTOR AND CREDITOR.**PURCHASER, 9, 10.**

The rights given to creditors by the registration laws, do not depend upon the legal or equitable form of the action in which the statute is invoked. When the purchaser, or the creditor in whose right he claims, comes within the proper construction and real import of the statute, the right conferred upon him by it is as available in a court of equity as at law; and the one tribunal no more than the other can annul the plain provisions of the statute. *Grimes v. Hobson*, 416.

DEED.**CONSTRUCTION, 7, 8, 9, 10, 11.****NOTICE, 2.****DELIVERY, 1.****TRUST AND TRUSTEES, 8.**

Where the uncertainty of description in a deed does not appear from the face of the deed, but arises from extraneous facts, parol evidence is admissible to remove or explain it. *Kingston v. Pickins*, 99.

DELINQUENT TAXES.**TAXES, 3.****DELIVERY.**

The fact that a deed, after its delivery to the grantee, had been by him returned to the grantor, for safe keeping, during the minority of the grantee or during an expected absence, neither negatives or disproves its previous delivery, nor annuls or destroys its effect to pass title to the property embraced in it, as between the parties. *Hart v. Rust*, 556.

DEMURRER.

Under our system of practice, which permits the plaintiff after giving a full statement of his cause of action, to add such allegations, pertinent to the cause, as he may think necessary to maintain his suit, a history of the facts out of which plaintiff's rights are supposed to grow, is often given, which may embrace several causes of action, perfectly or imperfectly stated, with prayer for alternative relief. When such a petition is excepted to, in such way as to test the plaintiff's right, under every aspect of his case, to any of the relief prayed for, it is the duty of the court—

1. To ascertain what combination of facts can be found stated in the petition which will constitute a cause of action, responsive to the prayer for general relief, or to any prayer for special relief.

2. To sustain the petition as containing a good cause of action, if such a combination of facts can be found stated, though all the other facts stated may be liable to the exceptions taken, and must thenceforth be treated as surplusage.

3. To sustain the petition only when the facts stated, giving a cause of action, stand in consistent harmony, when separately and conjointly considered, in connection with other facts stated. *Edgar v. Galveston City Co.*, 421.

DEPOSITIONS.

EVIDENCE, 2.

Questions, and answers thereto, relating to matters of opinion or of law, may be objected to, when offered; such objections do not relate to the manner and form of taking and returning depositions. *Purnell v. Gandy*, 191.

DESCRIPTION.

LIMITATION, 11.

1. Where the uncertainty of description in a deed does not appear from the face of the deed, but arises from extraneous facts, parol evidence is admissible to remove or explain it. *Kingston v. Pickins*, 99.

2. Held, That "620 acres of the headright of David Brown, situate about twelve miles north of Henderson, in the neighborhood of Bellview," used in a tax deed, is a sufficient description of land to form a basis for five years' limitation. *Flanagan v. Boggess*, 331.

3. A bond for title was executed to three hundred and seventeen acres of land, described as "the same upon which he (the purchaser) now resides," and being further described as a part of the O. M. Vinton league. It was afterwards ascertained that neither the house or improvement of the purchaser were on the Vinton league. In a suit by the vendor to collect the purchase-money: Held, There being no other description by which the uncertainty could be remedied, and the shape or locality of the three hundred and seventeen acres ascertained, the collection of the purchase-money note could not be enforced on account of failure of consideration. *Rodgers v. Daily*, 578.

DISCUSSED.

CASES DISCUSSED.

Danzey v. Swinney, 7 Tex., 626, discussed. *Cannon v. McDaniel*, 304.

DISTINGUISHED.

1. This case distinguished from *Hardy v. DeLeon*, 7 Tex., 467. *H. & G. N. R. R. Co. v. Jones*, 134.

2. This case distinguished from *Denison v. League*, 16 Tex., 405. *Morehead v. I. R. R. Co.*, 178.

3. Distinguished from *Cartwright v. Chabert*, 3 Tex., 261, and *Tryon v. Butler*, 9 Tex., 553. *Faver v. Robinson*, 204.

4. Distinguished from *Leland v. Wilson*, 34 Tex., 94. *Cundiff v. Teague*, 475.

5. Distinguished from *Langley v. Harris*, 23 Tex., 564. *Willis v. Ferguson*, 497.

6. This case distinguished from *McDonough v. Cross*, 40 Tex., 551, and *Harrison v. Oberthier*, 40 Tex., 385. *Turner v. Phelps*, 251.

7. *Johnson v. Bowden*, 37 Tex., 621, and 43 Tex., 676, distinguished from this case. *Hart v. Rust*, 556.

DIVIDING LINE.

1. A dividing line fairly agreed upon, and marked out by the owners of adjoining tracts of land, will be conclusive upon both, and those claiming under them, as to the true locality of their dividing line, though it may subsequently, after long acquiescence, be ascertained to vary from the course called for in the deeds, under which the parties claimed prior to agreeing upon the line; and the rule is the same, whether the marked line be recognized and called for in a deed, or whether it be subsequently marked and established by the parties. *Browning v. Atkinson*, 605.

2. A marked divisional line, found upon the ground in 1838, recognized as the divisional line by the original claimants of the adjacent tracts, and afterwards, for a series of years, by those claiming under them, though it may vary ten degrees, in a part of its length, from the course called for in the deed, could not be regarded as having been established in error, in a suit begun in 1862, and could not at that late day be corrected. *Id.*

DOMICILE.

1. The home or residence of a single man, with his servants, upon land owned by him in 1860, and until he entered the Confederate army in 1861, was not abandoned by his absence in the army. *Henderson v. Ford*, 627.

2. Nor was his authority left with an agent to sell the land, an abandonment. *Id.*

3. Upon the marriage of a resident of Texas with a woman in Alabama, with the intention entertained to make Texas their residence, the domicile of the wife became that of her husband. *Id.*

4. Upon the marriage, in another State, of a man who has a residence upon land in Texas belonging to him, the wife's domicile being fixed in Texas by the marriage, she becomes entitled to homestead rights in the Texas home of her husband. *Id.*

EQUITABLE ESTOPPEL.

1. An equitable estoppel may be proven under a plea of "not guilty," in trespass to try title. *Mayer v. Ramsey*, 371.

2. *Burleson v. Burleson*, 28 Tex., 416; *Page v. Arnim*, 29 Tex.; *Johnson v. Byler*, 39 Tex., 610. *Id.*

EQUITY.

INJUNCTION, 1, 3, 4.

PRACTICE, 21, 22.

JUDGMENT, 8.

TRUSTS AND TRUSTEES.

PLEADING, 3, 17.

Equity will enforce a verbal gift of land, from a father to his son, when clearly established, if it be accompanied by possession, and followed by improvements made on the strength of the gift, with the consent of the father. *Willis v. Matthews*, 478.

ESTATES OF DECEASED SOLDIERS.

If the decedent was of the class of persons whose estates were protected in the act of May 18, 1838, (Hart. Dig., art. 984,) and in the act of January 14, 1841, (Paschal's Dig., art. 1400,) as "volunteers from a foreign country, who may have fallen in the battles of the Republic," &c., it should be held that a grant of administration upon his estate, and all proceedings had therein, touching the administration, were absolutely void. *Vogelsang v. Dougherty*, 466.

ESTATES OF DECEDENTS.

ATTORNEYS' FEES, 1, 2, 3, 4, 5.

CHANGE OF VENUE, 3.

CLAIMS AGAINST ESTATES.

EXECUTOR, 1.

FORECLOSURE, 7, 8.

HOMESTEAD, 1.

JUDGMENT, 9, 10.

LAND CERTIFICATE, 3.

PRACTICE, 2.

STALE DEMAND.

1. If, at the time of the husband's decease, there was a homestead, the widow cannot abandon it and select another out of the estate in lieu thereof. *Hendrix v. Hendrix*, 6.

2. An affidavit supporting a claim against an estate made by an agent is not invalid because it does not show such agency; and an administrator knowing the affiant to be the agent of the owner of a claim, may approve such claim. *Heath v. Garrett*, 23.

3. In a suit upon a rejected claim against an estate, the withdrawal of an answer and consent to judgment by the administrator, is considered equivalent to an approval of such claim. *Id.*

4. Upon the withdrawal of an answer in a suit upon such rejected claim, judgment by default final may be rendered, if the claim be liquidated and proved by an instrument of writing; the clerk computing damages as in other cases. *Id.*

5. To settle on just and equitable principles the rights of the children of a former marriage, claiming in right of their mother against the children of a second marriage, and some of the children claiming under a will of the surviving husband, an account should be taken between the estate and heirs of the first wife, and that belonging to such heirs partitioned among them; as to the residue, the legatees should have the privilege of electing whether they will take as heirs or legatees. *Lumpkin v. Murrell*, 52.

6. In this case the expenses of repairs of a storehouse were charged to one heir, (by oversight:) *Held*, Error; her *pro rata* of interest should bear the same proportion of expense of repairs. *Id.*

7. Reasonable attorneys' fees for necessary service actually rendered in an estate, form part of the expenses of administration. *Gammage v. Rather*, 105.

8. Whilst it would be the better practice to present to an administrator, for allowance and approval, the mortgage as well as the notes, against the estate, which it was executed to secure, yet the presentation and allowance by the administrator of the notes alone will be

ESTATES OF DECEDENTS—*continued.*

sufficient to authorize a suit to foreclose the mortgage. *Cannon v. McDaniel*, 303.

9. The fact that an affidavit, proving up notes against an estate for allowance and approval, was made by one not a party to them, nor representing himself in the affidavit to be an agent of the party, cannot be made available, except in a direct proceeding to set aside the approval. The allowance and approval, being in the nature of a judgment establishing the notes, cannot be attacked in a collateral proceeding. The same rule applies after approval, when, in the certificate of authentication for allowance, the word "payments" has been left out. *Id.*

10. Article 4178, Paschal's Dig., authorized the issuance of the unconditional certificate to the "widow's legal heirs, executors, or administrators," &c.: *Held*, That under this statute, the heirs, executors, and administrators alike stood as representatives of the deceased, and not in their own right. *Marks v. Hill*, 345.

11. Prior to the probate act of 1848, no law of Texas authorized the setting aside of property at its appraised value for the support of the wife and children. *Id.*

12. To maintain a suit against an executrix of an estate, (who by the terms of the will is not under the control of the Probate Court,) and against one to whom the petition alleges that a fraudulent mortgage of property had been made by the testator, for the purpose of setting aside the conveyance, the plaintiff, who claims to be a creditor of the estate, must show—

1. That he has a valid claim against the estate.

2. That as to his debt, the mortgage was fraudulent, and that as a fraudulent incumbrance, it constitutes a substantial impediment to the collection of his debt. *Kerr v. Hutchins*, 384.

13. The facts entitling such party to a recovery being established, the judgment should be against the executrix for the amount of the debt, and a decree against the claimant, under the fraudulent mortgage, cancelling it as to so much of the property mortgaged as might be necessary when levied on and sold, to satisfy the plaintiff's judgment. *Id.*

14. The remedy given to claimants of an estate to bring suit for its recovery, in the county where the letters of administration were issued, (Paschal's Dig., art. 1354,) is subject to the right of either party to have the venue changed, for any cause provided by the general law governing changes of venue. *Treasurer v. Wygall*, 447.

The following propositions are maintained as the individual opinion of the Chief Justice :

1. A judgment cannot be rendered against the State treasurer, in his official capacity, on the suit of one claiming as an heir for uncollected assets placed in his hands under the statute. The statute only authorizes such a suit for the money when collected. *Id.*

ESTATES OF DECEDENTS—*continued.*

2. The comptroller, in drawing a warrant, and the treasurer, in paying, must do it under and in accordance with the terms of a law authorizing it; and there is no law authorizing the treasurer to pay out or deliver uncollected assets of an estate; but, on the contrary, there is a law directing him to collect them, and when collected as money, he can pay the same out, on a judgment rendered against him, under the statute authorizing suit against him for the money. *Id.*

3. The State treasurer, as such, cannot be bound by the judgment of a court, for that which he can find no authority to do by the law relating to and regulating his duties as an officer of the Government. He does not hold property of an estate deposited with him under the law in trust, to be delivered to any person who may establish by a judgment his beneficial interest in it, but in trust to be held until he can part with it according to the terms of some law, which authorizes or directs him. This is in accordance with his duties as State treasurer, in which capacity he is pos-sessed of the assets, and not as an individual depository of trust property, who can be compelled, by the judgment of a court of equity, to deliver it to one who has recovered a judgment for it. *Id.*

4. A suit cannot be maintained against the State treasurer, as such, for uncollected assets of an estate, which he has no authority under the law, to deliver. *Id.*

5. The key that unlocks the State treasury, is an act of the Legislature, directing a thing to be done, which may be demanded; and not the judgment of a court, founded on equitable considerations, reaching beyond and changing the terms of the law in the disposition of property. *Id.*

ESTOPPEL.

CAUSE OF ACTION, 1, 2.

MORTGAGE, 1.

PRACTICE, 19.

1. Where the vendor forecloses his lien, and a third party becomes the purchaser, the vendor is estopped from controverting the title, or from taking advantage of any irregularities in the proceedings of foreclosure; and if necessary to the security of the purchaser, equity will subject him to the rights of the plaintiff or vendor. *Peters v. Clements*, 114.

2. If one acts in such a manner as intentionally to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he would otherwise not have done, the party whose conduct thus induces the act, will be restrained from asserting his right, unless it be such a case as will admit of compensation in damages; and this is not changed by the fact that the party against whom the estoppel is claimed acted with

ESTOPPEL—*continued*.

a knowledge of the facts, but under a mistake of his legal rights. *Mayer v. Ramsey*, 371.

3. It was made the duty of the court by the law in force (Paschal's Dig., arts. 1294, 1295) to remove the executrix upon failure to return an inventory within sixty days from the grant of letters; and if creditors who were interested, and the court also, failed to require it, persons who acquired rights through her action in the capacity of executrix, should not be held to suffer an injury by her default, and by that of the court, in not furnishing a better security for her faithful discharge of duty. *Willis v. Ferguson*, 497.

4. An averment, in effect that the mortgage was worthless, made by the junior mortgagee in a suit against attorneys for damages alleged to result from negligence in examining title, does not estop him from enforcing any right resulting from the mortgage, the averment not being addressed to those claiming adversely, nor to any one else, to induce action on it in regard to the land. *Turner v. Phelps*, 251.

EVIDENCE.

BURDEN OF PROOF.

DAMAGES, 7.

FORECLOSURE, 4.

PAROL EVIDENCE, 1, 2, 3, 4, 5.

PLEADING, 7.

PRACTICE, 3.

PRESUMPTION, 1.

PRINCIPAL AND SURETY.

PUBLIC OFFICER, 1.

SEQUESTRATION, 5.

STOCK, 2.

VENDOR AND VENDEE, 11.

1. In a suit by the State against an officer on his official bond, the cause of action survives against the sureties on the death of their principal; and upon the suggestion of the principal's death, the cause may proceed against the securities, without alleging or proving the insolvency of the principal. *Boggs v. The State*, 10.

2. Only such objections as go to the form and manner of taking depositions are required to be made in writing, and notice thereof given before the trial. Objections to the answers of witnesses made in depositions as hearsay, secondary, or irrelevant evidence, may be made when the testimony is offered. *Woosley v. McMahan*, 62.

3. It is no objection to the deposition of a witness who translates in his evidence a Spanish document, that it had not at first been shown that the witness "was a Spanish scholar and competent to correctly translate the Spanish language into English," when his deposition disclosed the fact that he had once filled the post of Spanish translator in the General Land Office, and wrote and spoke the Spanish language. *Blythe v. Houston*, 67.

4. A plaintiff who relies on a protocol executed with no other date than "—, 1835," may prove the genuineness of the handwriting of the officer by whom the title purports to have been issued, and also by parol testimony, that a witness was present when the officer issued a grant to the grantee under whom plaintiff

EVIDENCE—*continued.*

claims,—its location, size, or date not remembered; such evidence is admissible to remove any suspicion of the protocol growing out of the blank date. *Id.*

5. It is error to admit evidence of damage resulting from the depreciation in the market price of goods seized under writ of sequestration, in the absence of any allegation in the pleadings that such special damage had been sustained; being an uncertain and not necessarily a natural or legal consequence of the seizure and detention, such damage must be specially pleaded. *Harris v. Finberg*, 80.

6. Upon an issue of inadequacy of price for which land was sold, it is admissible to prove, by parol evidence, that the land conflicted, or was supposed to be in conflict, with an elder grant, and also to show the supposed merits of the conflicting titles, as affecting the value of the land in general esteem, or with those who might wish to purchase. *Norvell v. Phillips*, 161.

7. Though the existence and extent of the conflict of two grants can only be definitely determined, in many instances, by a survey, there is no reason why it may not be proved by any one who can testify to the fact. *Id.*

8. A question and answer eliciting merely the conclusion of the witness as to a matter of opinion or of law: *Held*, Not admissible, and that objections made thereto when the depositions were offered should have been sustained. *Purnell v. Gandy*, 191.

9. Parol evidence is admissible to show that the articles enumerated in a receipt given by the agent of the creditor were never, in fact, delivered to the agent, and this, though the instrument on its face specified that the articles are "hereby turned over and delivered" to the agent. *Pool v. Chase*, 207.

10. It is no objection to a decree of partition, when offered in evidence as a link to support plaintiff's title, that the proceedings upon which it was based are not shown, nor that service on the parties is not shown, when the decree recites that the defendants were duly cited and made default. *Truchart v. McMichael*, 222.

11. In a suit by a plaintiff to secure title to land for the use of all, to whom in his petition, it is alleged that he had sold it, the right of the party for whose use the suit is prosecuted to the land must be established by evidence other than the declaration of use to him in the petition, before a recovery can be had. *Castleman v. Sherry*, 228.

12. A statement of facts purporting to contain the testimony of a party to a suit in a former trial, but which was not signed by him, does not stand on the footing of admissions in writing, and is not admissible against him. *Id.*

13. Parties to a suit are not affected or bound by evidence, however conclusive it may seem to be, given in another case with which they had no connection, even if the record in such case show-

EVIDENCE—continued.

ing such facts had been offered in evidence on the trial. *Austin v. Dungan*, 236.

14. Where it is shown that a tract of land sued for forms part of a block of surveys, the outer corners of the surveys in the block being known and identified, and from adjacent surveys the position of the land sued for is thus ascertained and fixed, such evidence of identity of the land sued for is sufficient, though no lines or corners can be found of the survey in controversy. *Jones v. Burgett*, 285.

15. A conveyance from H. to V. of land, described the beginning corner, and then proceeded to direct how the lines were to be run from this point, so as to include 767 acres, but did not purport to be a conveyance of land actually surveyed or marked out: *Held*, That in a suit for the land by those claiming through this deed, the plaintiff, to entitle him to recover all the land, must show that the field-notes set out in his petition and relied on by him, commenced at the place designated in said deed. *Bell v. Vanzant*, 300.

16. The testimonio of a deed, by public act executed in 1834, cannot be admitted to record without proof of its execution. *Hutchins v. Bacon*, 408.

17. A deed from an administrator was excluded from the jury, on objection being made that the grant of letters of administration to him was a nullity, because prior to the issuance of letters, another person, named as executrix in the will, continued to discharge the duties of executrix, and no vacancy existed in the administration which would authorize the appointment of the grantor in the deed. The progress of the case disclosed, that the continuance of the party named as executrix, to discharge her duties as such, when the administrator was appointed, was a controverted fact: *Held*, That the exclusion of the deed was error. *Willis v. Ferguson*, 497.

18. A question and answer given, which affords a conclusion from facts known to the witness, may properly go to the jury as evidence, though the weight of such testimony be little. *Tompkins v. Toland*, 585.

EXECUTION.

1. The plaintiff in execution acquires a fixed and certain interest in the land upon which his execution is levied, from the date of the levy, which entitles him to have satisfaction of his judgment by its sale, and which cannot be defeated or interfered with by the defendant in execution, or any one setting up a subsequent right or claim to the land through or under him. *Borden v. McRae*, 396.

2. Since the act of 1846, (Paschal's Dig., arts. 987, 993,) defining the office and duties of constable, and authorizing that officer to execute process throughout the county, a constable may levy an execution on land, which, though in the county, is not in the beat or precinct for which he is constable; and in so doing, it is not necessary for him to go on the land with his execution. *Cundiff v. Teague*, 475.

EXECUTOR.

JUDGMENTS, 1, 9, 10.

PRACTICE, 2.

TRUST AND TRUSTEES, 8.

No judgment can be rendered in favor of one claiming against an executor, after exceptions are sustained to his answer, on an assumed confession of the facts alleged in the petition. The facts on which a claim of right against the estate is based must be sustained by evidence. *Hendrix v. Hendrix*, 6.

EXECUTORY CONTRACT.

While the doctrine that a mortgage to secure the purchase-money, executed by the vendee at the time he receives his conveyance, has the effect to make the contract executory, is well settled by the decisions of this court, it is believed that its extension, so as to give like rights to others than the vendors, may lead to confusion; and such application of the principle should only be made where the right is clear. *Wright v. Wooters*, 381.

EXEMPLARY DAMAGE.

A corporation, as well as an individual, may be guilty of such "willful act, omission, or gross neglect," as to subject it to exemplary damages; but no more than individuals are they responsible for the malicious acts of their agents. No distinction can be made as to liability for damages inflicted by an agent, whether the master be a natural or an artificial person. *Hays v. H. G. N. R. R. Co.*, 272.

EXPERTS.

It is no objection to the deposition of a witness who translates in his evidence a Spanish document, that it had not at first been shown that the witness "was a Spanish scholar, and competent to correctly translate the Spanish language into English," when his deposition disclosed the fact that he had once filled the post of Spanish translator in the General Land Office, and wrote and spoke the Spanish language. *Blythe v. Houston*, 67.

FACT CASES.

CHARGE OF COURT, 6.

LIMITATION, 13.

POSSESSION, 6.

1. See statement of the case for damages which are not the natural, proximate consequence or legal result of the seizure of property by attachment, and held to be too remote to be the basis for a recovery. *Pinson v. Kirsh*, 26.

2. See facts stated in the opinion, which were held insufficient to authorize the verdict on a claim for damages for wrongful suing out of an attachment. *Darcy v. Turner*, 30.

FACT CASES—*continued*.

3. See discussion of charges improperly allowed in a suit by the children of deceased wife against the estate of the surviving husband—rents, hire of slaves, interest, &c. *Lumpkin v. Murrell*, 52.

4. See a description, though vague and uncertain, held admissible, with other evidence to identify the land intended to be conveyed. *Kingston v. Pickins*, 99.

5. See a discussion of contradictory calls, with reference to ascertaining the meaning of the conveyance. *Id.*

6. See facts held insufficient to authorize such relief against the defendant. *Hendrix v. Nunn*, 142.

7. See facts held insufficient evidence of actual settlement under said statute. *Burleson v. Durham*, 153.

8. See facts held insufficient evidence that a party was a "volunteer from a foreign country, who had fallen," &c. *Vogelsang v. Dougherty*, 467.

9. See facts held insufficient to support an action for damages against a railway company, from the negligence of one of its employees, in an action brought by another of its employees. *Robinson v. H. & T. C. R. W. Co.*, 540.

10. See facts insufficient to support the verdict. *Tompkins v. Toland*, 585.

FACTOR.

Ordinarily, the possession of cotton by a cotton factor, who is a factor only, not engaged in buying and selling on his own account, raises a presumption that the cotton does not belong to him, but is held on commission for another; but this presumption may be rebutted by the real owner permitting his ownership to be concealed, and the property to be so acquired, managed, and possessed, by the factor, as to indicate to third persons that the factor is the real owner. Under such circumstances, the factor, so held out as the real owner, may sell the property, in discharge of his previous debt, to one who had no notice, actual or constructive, of the defects in his title, and the sale will be valid. *Morris v. Sellers*, 391.

FEDERAL COURT.

REMOVAL OF CAUSE TO UNITED STATES COURT.

FIXTURES.

1. The criterion for determining whether a chattel has become an immovable fixture, consists in the united application of the following tests:

1. Has there been a real or constructive annexation of the article in question, to the realty?

2. Was there a fitness or adaptation of such article to the use or purposes of the realty with which it is connected?

3. Was it the intention of the party making the annexation, that the chattel should become a permanent accession to the

FIXTURES—*continued*.

freehold?—this intention being inferable from the nature of the article, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and purpose or use for which the annexation is made. *Hutchins v. Masterson*, 551.

2. Of these three tests, prominence is given to the question of intention to make the article a permanent accession to the freehold, while the others are chiefly of value as evidence regarding this intention. *Id.*

3. A sugar-mill erected by the owner of a plantation, and sold as part of it, as to the rights of vendees, is a fixture, and part of the realty. *Id.*

4. A parol sale of a fixture by the owner of the land, would be void under the statute of frauds. *Id.*

FORECLOSURE.

1. In a suit to enforce the vendors' lien, a subsequent vendee, in possession, and claiming under a recorded deed, is a necessary party. *Carter v. Atto way*, 108.

2. As against a purchaser, of whose claim there is notice, a sale had under a decree of foreclosure against the original vendee alone, is not sufficient to pass title. *Id.*

3. Nor is it different where such purchaser knew, at his purchase, that the purchase-money, in whole or in part, was unpaid, and knew of the proceedings to enforce the lien. *Id.*

4. The pleadings not admitting that the defendant held by purchase prior to the commencement of the suit to foreclose, it was not error to admit the decree and sale made under it, when offered as evidence of title. *Id.*

5. Where a purchaser, under decree of foreclosure, brought trespass to try title against a prior purchaser, the equities which the plaintiff had as against the land, by his owning the judgment, by virtue of his purchase of the land and payment of the judgment, cannot be litigated. By proper pleadings, the plaintiff can enforce his equities against the land. *Id.*

6. Where the vendee is in default in the payment of the purchase-money, the vendor may sue for the land and recover it, unless the vendee make good his equitable title by payment; or he may purchase his lien, and subject the land to sale for the payment of the purchase-money. *Peters v. Clements*, 114.

7. The holder of a note secured by a vendors' lien and indorsed by the payee, who has since died, is not required to present the claim to the administrator of the indorser before enforcing the vendors' lien against the estate of the original maker of the note; if it would advantage the estate of the indorser to have the claim against the maker, he should have taken up the note, whether presented or not. *Watt v. White*, 338.

FORECLOSURE—continued.

8. A decree of foreclosure does not conclude a purchaser whose rights in the property were known before the commencement of the foreclosure proceedings. *Wright v. Wooters*, 380.

9. A purchaser at foreclosure sale (and particularly, if the plaintiff) has the right of action to foreclose against the subsequent purchaser; in which suit the subsequent purchaser would have the right to make any defense he has; to put in issue the execution of the mortgage; if other lands were included in the mortgage, he may have necessary parties made, and the question of amount, with which the tract of land is chargeable, investigated, and have other lands, which were included in the mortgage, subjected to the debt, so that the tract purchased shall be subjected only to its proper proportionate amount. *Id.*

FOREIGN ADMINISTRATOR.

1. A foreign executor or administrator cannot maintain a suit in this State, in virtue of his foreign letters testamentary or of administration. *Simpson v. Foster*, 619.

2. A legatee, under a foreign administration, admitted to the ownership of personal property, may afterwards sue here in his own name for the property without the probate of the will. *Id.*

3. The fact that the will makes the executor sole legatee upon trusts declared, will not authorize suit to be brought by such foreign executor. *Id.*

4. Such executor could not execute a deed to pass land of the estate in Texas without probating the will in this State. *Id.*

FORMS OF ACTION.

The rights given to creditors by the registration laws, do not depend upon the legal or equitable form of the action in which the statute is invoked. When the purchaser, or the creditor in whose right he claims, comes within the proper construction and real import of the statute, the right conferred upon him by it, is as available in a court of equity as at law; and the one tribunal no more than the other can annul the plain provisions of the statute. *Grimes v. Hobson*, 416.

FRAUD.

CHARGE OF COURT, 13.

CONTRACT, 5, 6.

FRAUDULENT REPRESENTATIONS.

1. Allegations of fraud must specify the acts insisted on as fraudulent. *Hendrix v. Nunn*, 142.

2. A married woman cannot avoid a deed to which her separate acknowledgment appears to have been taken by a competent officer, in the terms of the law, on account of the deception and fraud practiced on her by her husband in procuring her signature; or the failure of the officer to acquaint her with the contents of the instru-

FRAUD—continued.

ment, in the absence of evidence tending to charge those claiming under the deed with notice. *Pool v. Chase*, 207.

3. In a suit to set aside a mortgage as fraudulent, the facts being established that the party charged with the fraud was largely indebted, at the time the mortgage was made, to various creditors, and mortgaged to one creditor "the mass" of his property, leaving not enough to satisfy the demands of other creditors, does not authorize the court to charge that such facts constituted fraud in law. It is the province of the jury, and not of the court, to draw the inference of fraud from such facts. *Kerr v. Hutchins*, 385.

FRAUDULENT CONVEYANCE.**JUDGMENT, 5.**

1. To maintain a suit against an executrix of an estate, (who by the terms of the will is not under the control of the Probate Court,) and against one to whom the petition alleges that a fraudulent mortgage of property had been made by the testator, for the purpose of setting aside the conveyance, the plaintiff, who claims to be a creditor of the estate, must show—

1. That he has a valid claim against the estate.

2. That as to his debt, the mortgage was fraudulent, and that as a fraudulent incumbrance, it constitutes a substantial impediment to the collection of his debt. *Kerr v. Hutchins*, 384.

2. The facts entitling such party to a recovery being established, the judgment should be against the executrix for the amount of the debt, and a decree against the claimant, under the fraudulent mortgage, cancelling it as to so much of the property mortgaged as might be necessary when levied on and sold, to satisfy the plaintiff's judgment. *Id.*

3. A judgment rendered in a suit by a creditor against an executrix, and one claiming under the fraudulent conveyance, which sets aside such conveyance so far as the same may be necessary to secure the plaintiff's debt, does not affect the validity of the conveyance beyond its terms, so far as the executrix is concerned, nor as to other creditors who have not asked relief. *Id.*

FRAUDULENT REPRESENTATIONS.

Where a vendor represented that the subject of sale was free from incumbrance, save a small and inconsiderable balance of an amount, secured by a deed of trust on the property sold, which representation was false as to the amount, in an action for the purchase-money, that fact being shown, its effect is not impaired by showing that the vendee, having notice of the incumbrance, could have ascertained its amount by inquiry. *Griffeth v. Hanks*, 217.

GIFT.

Equity will enforce a verbal gift of land, from a father to his son, when clearly established, if it be accompanied by possession, and

GIFT—*continued.*

followed by improvements made on the strength of the gift, with the consent of the father. *Willis v. Matthews*, 478.

GRANT.

CHARGE OF COURT, 9.

LIMITATION, 7, 8.

POSSESSION, 4.

1. By the XIVth Article of the Provisional Government of Texas, all land commissioners were ordered forthwith to cease their operations during the unsettled condition of the country. That article went into force on the 13th day of November, 1835, after which date any title issued by a commissioner was a nullity. The plaintiff, after taking depositions to prove the genuineness of the testimonio of a grant, which testimonio purported to have been issued on the 15th of November, 1835, introduced on the trial the protocol of the grant or title of possession, issued by George W. Smyth, commissioner, with date as follows: "Given at the town of Nacogdoches, —, A. D. 1835." The protocol showed the date of the application and the order of survey to be September 15, 1835, and the date of the field-notes and of the order that title issue, to be November 11, 1835. The genuineness of the testimonio was questioned under oath, and both the protocol and a translation of the testimonio were in evidence: *Held*—

1. That the suspicion which might grow out of the irregularity of the protocol in its date alone should not prevent the operation of the presumption that the commissioner who issued it acted in all respects in conformity to law.

2. In the absence of any evidence of the date of a grant issued in 1835, the law would presume that the commissioner acted in the extension of title at a time when he might legally do so; and that the true date was prior to the closing of the land office, in the absence of evidence sufficient to overcome such presumption; and after the lapse of thirty-five years, the evidence required to rebut the presumption must be full and satisfactory.

3. In favor of innocent purchasers, the presumption of the regularity and validity of a grant will be so strengthened, by acquiescence and the lapse of time, as to stand until rebutted by satisfactory evidence.

4. But this presumption could not prevail to validate a grant without date except "——, 1835," if the genuine testimonio of the grant showed that the title was extended after the close of the land office in 1835, unless it was shown by evidence that the testimonio was issued on a day subsequent to making the protocol.

5. The making of the protocol and the issuance of the testimonio were ordinarily contemporaneous acts.

6. The statement of facts failed to show that what purported to be the original Spanish testimonio was ever read to the jury,

GRANT—*continued.*

but did show that what purported to be a translation thereof was read without objection, and that the Spanish document was attached as an exhibit to a deposition which was read, and in which it was referred to, and also that it was exhibited to a witness on the stand during his examination. The party who objected, on appeal, to the Spanish original being regarded in evidence, had himself asked an instruction on the trial, based on the hypothesis that the paper had been read: *Held*, That under these circumstances the original Spanish testimonio must be regarded as having been in evidence.

7. The testimonio is a second original, and may be resorted to for the purpose of supplying the defects of the protocol.

8. The testimonio being in evidence, bearing a specific date showing the issuance of title after November 13, 1835, it was the duty of the court to submit to the jury a charge based on the hypothesis of its genuineness. *Blythe v. Houston*, 65.

2. A plaintiff who relies on a protocol executed with no other date than "——, 1835," may prove the genuineness of the handwriting of the officer by whom the title purports to have been issued, and also by parol testimony, that a witness was present when the officer issued a grant to the grantee under whom plaintiff claims,—its location, size, or date not remembered; such evidence is admissible to remove any suspicion of the protocol growing out of the blank date. *Id.*

3. Upon an issue of inadequacy of price for which land was sold, it is admissible to prove, by parol evidence, that the land conflicted, or was supposed to be in conflict, with an elder grant, and also to show the supposed merits of the conflicting titles, as affecting the value of the land in general esteem, or with those who might wish to purchase. *Norvell v. Phillips*, 161.

4. Though the existence and extent of the conflict of two grants can only be definitely determined, in many instances, by a survey, there is no reason why it may not be proved by any one who can testify to the fact. *Id.*

5. Emigration and settlement in the State constituted the leading consideration of the grant of headright land certificates; and where the head of a family died before its issuance, (or, as in this case, before the unconditional certificate had issued,) the certificate, no matter in whose name issued, would inure to the benefit of his estate. *Marks v. Hill*, 345.

HOME.

DOMICILE, 1.

HOMESTEAD.

ATTACHMENT, 8, 9.

ESTATES OF DECEDENTS, 1.

DOMICILE, 4.

JUDGMENT, 7.

1. If, at the time of the husband's decease, there was a homestead,

HOMESTEAD—continued.

the widow cannot abandon it and select another out of the estate in lieu thereof. *Hendrix v. Hendrix*, 6.

2. When a rural homestead is fixed upon a tract of land exceeding two hundred acres in quantity, one undivided half interest in the whole tract being the separate property of the wife, and the other half interest, being in equity the separate property of the husband, the husband's interest, subject to forced sale at the suit of creditors, is the undivided interest in the whole tract less two hundred acres, protected as the homestead from forced sale. The exemption is of two hundred acres of the land owned by both, and not of two hundred acres owned by the husband. *Willis v. Matthews*, 479.

3. A single man resided on his own land in 1860, living with his slaves in cabins, and cultivating a field, and until September 1861, when he entered the Confederate army and left the State, leaving an agent, authorized to manage his affairs and to sell the land. He married, in 1863, in Alabama, in contemplation of a permanent residence in Texas, and in the fall of that year, from ill health, returned home, and in a few months contracted for the sale of his said residence, and effected the sale through the attorney appointed by him on entering the army. The wife joined her husband in Texas, in 1865, remaining with him, moving from place to place with his relatives until his death in 1866, and returned to Alabama two or three months after the death of her husband, having no other homestead: *Held*, That the widow was entitled, as against the vendee of her husband, to homestead rights. *Henderson v. Ford*, 628.

HUSBAND AND WIFE.

COMMUNITY PROPERTY, 1.

CONVERSION, 2.

IDEM SONANS.

A petition, citation, and service on John R. Favers will not support a judgment by default against John R. Faver. *Faver v. Robinson*, 204.

INJUNCTION.

PARTIES, 6.

1. It is not a sufficient ground for an injunction restraining the collection of a tax upon an assessment actually made, that it has not been correctly described on the assessment rolls, prepared from the assessments actually made. *Prima facie* the tax is due upon the assessment, and equity will not aid one who is himself in default. *Harrison v. Vines*, 15.

2. A judgment rendered by a justice of the peace, which is not appealed from, and which directs a forced sale of articles for its satisfaction, which are exempt under law from forced sale, is not a nul-

INJUNCTION—*continued.*

lity, however erroneous; and when no means have been used to correct the error by appeal, the conclusive force of the judgment cannot be evaded by a resort to injunction. *Rountree v. Walker*, 200.

3. Where an injunction issued restraining the sale of land under a claim established by the defendant in the injunction suit, and a sale was ordered upon making a bond to secure the plaintiff in the injunction suit, and under such order, sale was made: *Held*, Error, in subsequent proceedings, to hold the sale a nullity in favor of the plaintiff in the injunction suit, on his successful establishment of his superior right to the security of the lien upon the land so sold. *Watt v. White*, 338.

4. A petition in equity, which seeks to enjoin a judgment, upon the ground that the plaintiff's counsel had, in the proceedings on which the judgment was rendered, consented, without authority, to give a lien upon land upon a part of which the plaintiff alleged his homestead was situated, would, if true, entitle him to be relieved, if at all, only to the extent of the homestead. As to the other lands specified in the judgment, it might, in the absence of averment to the contrary, have been a lien, without it being so stipulated in the judgment. *Roller v. Wooldridge*, 485.

INNOCENT PURCHASER.

PRESUMPTION, 1.

VERDICT, 2.

An executed contract for substitute in the C. S. army, after performance, is effectual in support of payment under a plea of innocent purchaser. *Peters v. Clements*, 114.

INTEREST.

MEASURE OF DAMAGES, 4.

It seems that in an action upon a contract for the delivery of personal property paid for, that interest should not be computed from the time fixed in the contract for its delivery, where a higher value at a subsequent time was adopted as the measure of damages. The interest should only be computed from the date of the valuation fixed. *Masterson v. Goodlett*, 402.

INTERNATIONAL LAW.

CONFEDERATE WAR, 1.

INTERVENOR.

PRACTICE, 25.

It can be no ground of complaint that necessary parties to a suit are allowed to make themselves parties, as intervenors, at their own instance. *Norvell v. Phillips*, 162.

JUDGMENT.

COSTS, 3.

ESTATES OF DECEDENTS, 9.

15.

EXECUTOR, 1.

FRAUDULENT CONVEYANCE.

INJUNCTION, 3.

JUDGMENT BY DEFAULT.

JUDGMENT CREDITOR.

JUDGMENT IN REM.

JUDGMENT LIEN.

JURISDICTION, 5.

MORTGAGE, 1.

PLEADING, 17.

PRACTICE, 2.

PRACTICE IN DISTRICT
COURT, 4.VENDOR AND VENDEE,
18.

1. No judgment can be rendered in favor of one claiming against an executor, after exceptions are sustained to his answer, on an assumed confession of the facts alleged in the petition. The facts on which a claim of right against the estate is based must be sustained by evidence. *Hendrix v. Hendrix*, 6.

2. A judgment rendered by agreement between the plaintiffs and intervenor, which undertook to divide between them the land in controversy, to which agreement the defendant was not a party, he having no legal notice of intervenor's claim, will be reversed for obvious error. *Simmons v. Fisher*, 127.

3. A motion which, in terms, asks an arrest of judgment, on the ground that there is nothing in the verdict which shows that it was rendered against any party to the suit, is, in legal effect, a motion to set aside the verdict; and the action of the court below, on such a motion, which pronounces the judgment "arrested," leaves the case standing in court as if it had never been tried; such action of the court is not a final judgment from which an appeal can be taken. *Morehead v. I. R. R. Co.*, 178.

4. A judgment rendered by a justice of the peace, which is not appealed from, and which directs a forced sale of articles for its satisfaction, which are exempt under law from forced sale, is not a nullity, however erroneous; and when no means have been used to correct the error by appeal, the conclusive force of the judgment cannot be evaded by a resort to injunction. *Rountree v. Walker*, 200.

5. A judgment rendered in a suit by a creditor against an executrix, and one claiming under the fraudulent conveyance, which sets aside such conveyance so far as the same may be necessary to secure the plaintiff's debt, does not affect the validity of the conveyance beyond its terms, so far as the executrix is concerned, nor as to other creditors who have not asked relief. *Kerr v. Hutchins*, 384.

6. The members of the County Court must be organized as a court, under the law, before their conclusions can be received and acted on as the judgment of the court. *Worsham v. Richards*, 441.

7. A judgment, in a proceeding by attachment, enforcing the attachment lien on land, is not conclusive of the defendant's homestead rights in the land attached, no issue regarding the homestead having been made by the pleadings. The effect of such a judgment

JUDGMENT—*continued.*

is to enforce the attachment lien on whatever interest, subject at the time of the attachment to execution and forced sale, the defendant had in the land; the purpose of attachment is, to hold the property on which it is levied, so that it may be subjected to execution, so far as it is legally liable to execution, and no further. *Willis v. Matthews*, 478.

8. A proceeding in equity, to set aside a judgment rendered in an ordinary action at law, cannot be maintained on the ground of irregularity, committed in the proceedings on which the judgment was rendered; a substantial injury must be shown. *Roller v. Wooldrige*, 485.

9. The validity of a judgment, rendered in a court of general jurisdiction, against one named in a will as executrix and sole legatee, after the failure of the executrix to file an inventory of the estate, which judgment recites that she is executrix, and directs the issuance of execution against the executor to sell the property of the estate to satisfy the judgment, however erroneous it may have been, had an appeal been prosecuted, is not a nullity, and cannot be attacked in a collateral proceeding. *Willis v. Ferguson*, 496.

10. When there has been long-continued action of such an executrix, in the obvious capacity of an independent executrix, after failure to return an inventory of the estate, as required by law, and neither the court having jurisdiction, nor creditors interested, have required a compliance with the statute, those who have, in good faith, acquired property of the estate, through the action of the executrix, as such, will not be permitted to suffer on account of a failure to file the inventory. *Id.*

11. A judgment was rendered for a sum found to be due on one of two notes, the other not being due at the time of judgment, both of which, it was claimed, were secured by a mechanics' lien on a house and fifty acres of land, to be taken out of a larger tract, "in such shape as may be fair and equitable." The judgment was rendered for the note due, and it ordered sale of the house and forty acres of land, "to be taken out of defendant's tract in as near a square shape as it may be done"—the sale to be for enough cash to discharge the note due, and on a credit for the remainder, until the other note should become due; but "if the premises should not sell for a sufficient sum to pay the entire two notes, then the sheriff shall apportion the said purchase-money ratably between the note due," for which judgment was rendered, and the note not due, and the portion rated to the note due, and for which judgment was rendered, "shall be for cash, and the remainder on a credit." It also provided that for the postponed payment, the sheriff should take a lien on enough of the land sold to secure the deferred payment: *Held*—

1. Before default of payment of the first of several notes secured by mortgage, suit could be maintained for a foreclosure of the mortgage to satisfy the first note, and for a sale of the entire

JUDGMENT—*continued.*

mortgaged premises, if the land is not properly susceptible of division.

2. The decree in such a case should be so rendered as to make equitable provision for the payment of all of the notes embraced in the mortgage lien.

3. The decree should be so shaped, if the matter is not at once concluded by a rebatement of the interest on the notes not due, that the court should have control of the case and the title of the land until the notes secured by the mortgage lien are all satisfied. A judgment ordering a sale by the sheriff, and requiring him to take a lien on the land sold to secure a deferred payment, is error. If that practice were permitted, another suit to collect the purchaser's note would be necessary in case of default.

4. The description of the land in the decree was defective, for want of certainty. The boundaries of the tract of which the sheriff was to place the purchaser in possession, should not be left to the sheriff, nor to adjustment between the purchaser and the owner of the remainder of the tract.

5. The evidence to establish a mechanics' lien (see Statement of the Case) was not presented in a way to conform to either of the modes of fixing a lien prescribed in the statute. (Paschal's Dig., arts. 7112, 7115.) The note sued on, executed after the work was finished, was not a contract for the building of a house. If regarded as a claim under a verbal contract, it was not sufficient to fix a lien, because it was not shown that a copy of it had been served on the defendant, as required by statute.

6. The provisions of the statute must be complied with substantially in every respect, in order to fix a mechanics' lien on the homestead. *Tinsley v. Boykin*, 592.

JUDGMENT BY DEFAULT.

1. The sheriff's return on a citation to J. W. Hendon, the defendant in this suit, was as follows: "Came to hand January 21, 1876, and executed same day by delivering to J. N. Hendon, in person, a true copy of the written citation, together with a certified copy of plaintiff's original petition:" *Held*, That it failed to show with reasonable certainty that the citation was served on the defendant in the suit, and no judgment by default could be rendered against the defendant. *Hendon v. Pugh*, 211.

2. The defendant is bound to notice the filing of such amendments, and judgment by default may properly be taken without service of notice of filing. *Spencer v. McCarty*, 213.

JUDGMENT IN REM.

LIEN, 1.

MECHANICS' LIEN, 1.

The mechanics' lien law of 1871, (Paschal's Dig., art. 7112,) while

PARTIES, 1.

PRACTICE, 1.

JUDGMENT IN REM—*continued.*

it authorizes a sub-contractor, or employe of the contractor, to fix a lien upon the house and lot or land which may be enforced by a judgment against the owner, after a compliance with the provisions of the statute, still it does not authorize him to recover a general judgment *in personam* against the owner for the debt claimed, to be collected out of his property generally, as other judgments rendered against him for his own debts. *Waldroff v. Scott*, 1.

JUDGMENT LIEN.

LIEN.

JURISDICTION.

COUNTY COURT, 1.

SEQUESTRATION, 4.

DAMAGES, 6.

STATE TREASURER.

1. When facts are stated in a petition in error which are contested by answer of the opposite party, the Supreme Court has power, under sec. 2, art. V of the Constitution of 1876, to hear affidavits on which it can properly determine the exercise of its own jurisdiction. *Simmons v. Fisher*, 126.

2. The filing of an application, in due form, for the removal of a cause from a State court to a Circuit Court of the United States, which contains a good cause for removal, under the laws of the United States, when the same is filed by one authorized by law to make the application, and the filing of the bond required in such case, have the effect to suspend instantly the jurisdiction of the State court. *Durham v. Southern L. I. Co.*, 182.

3. When a cause has been improperly transferred from a State court to a court of the United States, the United States court alone has jurisdiction to correct the error. *Id.*

4. When, of several defendants in an action, one only appeals, the case will be considered on appeal only with regard to such matters as affect the rights of appellant. *Cannon v. McDaniel*, 303.

5. Under the act of March 20, 1848, regulating proceedings in the County Court, the owner of notes, secured by mortgage on the property of an estate, could enforce his lien in the County Court, and in no other court, unless there was some good ground for invoking the jurisdiction of the District Court. *Id.*

6. B purchased land from C, from whom he received a deed, and to whom he gave three notes, with D and E as sureties for the purchase-money, and executed a mortgage to secure the same; afterwards C assigned to X two of the notes only, and, in conjunction with his wife, guaranteed their payment; X held the notes so assigned for the use of Y, and, as his trustee, had the same allowed, after B's death, by his administrator, and approved by the County Court; afterwards, X, for the use of Y, recovered a judgment against D and E, the sureties, and C and his wife, as guarantors, having alleged the insolvency of B's estate. In entering the judg-

JURISDICTION—*continued.*

ment, the clerk failed to show that it was for the use of Y. X failed to collect the judgment. In a suit afterwards brought by Y to correct the judgment, so as to show his interest, and as subrogated to the rights of C and wife, to recover judgment against B's administrator foreclosing the mortgage: *Held*—

1. That B did not, by his purchase, acquire a legal title to the land, but it remained in C, who, as to the notes assigned by him, held it in trust for the benefit of Y.
2. That as C had not only assigned two of the notes, but had guaranteed their payment, there being no other fund except the proceeds of the sale of the mortgaged land, Y was entitled to priority of payment over the note not assigned.
3. That the case, as stated, presents equities which the County Court had no power to adjudicate.
4. That Y, being subrogated to the rights of C, would not lose his claim upon the land, though the remedy on the notes had been lost.
5. That the judgment in the suit by Y, to correct the judgment procured by X, should have been for the principal and interest due on the notes, subjecting the land to sale for its satisfaction, with an order directing its execution by the administrator in the administration of the estate. *Id.*
7. Probate courts have no power to dispose of property of an estate, except as it is conferred by the statutes. *Marks v. Hill*, 345.
8. As the statute has required the application to remove a county seat, to be made to the County Court, and they are to determine whether it has been made by a majority of the registered voters of the county, and to order the election and give notice thereof, it may be inferred that the Legislature intended to confide to the County Court the investigation and determination of all the other facts necessary to a fair and legal election. *Worsham v. Richards*, 441.
9. The acts forbidding the grant of administration upon the estates of deceased soldiers, create exceptions to the general power and jurisdiction of the Probate Courts. To have the benefit of the exception, the facts relied on, as avoiding the jurisdiction, should be clearly established, the presumption being in favor of the jurisdiction. *Vogelsang v. Dougherty*, 466.
10. The exception provided in said acts against the grant of administration in estates of deceased soldiers, did not include citizens of Texas; and it was error to instruct the jury that said acts were applicable alike to all volunteer soldiers, whether citizens, or from a foreign country. *Id.*
11. When the general jurisdiction, assumed by the Probate Court, to grant letters of administration, is attempted to be collaterally impeached, thirty-one years after its assumption, and more than twenty years after one of plaintiffs came to Texas to look after the estate, by proving facts, avoiding the jurisdiction, (as that the de-

JURISDICTION—*continued.*

ceased was a soldier, &c.,) and when the lands have, subsequent to sale under such administration, been bought and sold by innocent parties, and in which time, part has a second time passed through the Probate Court, it seems, that, even had the proof of the facts alleged been clear, the claim of the heirs, attacking such administration, should be held a stale demand. *Id.*

LACHES.

1. It may be questioned whether a party can, at his mere option, and without excuse for delay, allow several terms of court to pass and then claim the heavily accumulated penalty of ten per cent. per month against a sheriff from the date of such failure. *Scogins v. Perry*, 111.

2. In a suit instituted in the ordinary way, by petition, against the sheriff and his sureties for money by him collected, and which, after demand, he had failed to pay over, and for ten per cent per month damages: *Held*, The suit being brought twenty months after the collection, that a party claiming the benefit of a penal statute must bring himself strictly within its provisions, and a demurrer to so much of the petition as claimed the penalty of ten per cent. per month was properly sustained. *Id.*

LAND.

ADMINISTRATORS' SALE, 1,

2.

BOUNDARY, 6.

CHARGE OF COURT, 7, 8.

EVIDENCE, 14.

LAND CERTIFICATE, 1, 2.

LIEN, 17.

LOCATION, 1.

PRACTICE, 25.

PRE-EMPTION, 1.

PURCHASER, 5.

SETTLER, 1, 2, 3, 4.

SURVEY, 4.

VENDOR AND VENDEE, 14, 16.

1. In a suit by a plaintiff to secure title to land for the use of all, to whom in his petition, it is alleged that he had sold it, the right of the party for whose use the suit is prosecuted to the land must be established by evidence other than the declaration of use to him in the petition, before a recovery can be had. *Castleman v. Sherry*, 228.

2. If the holder of the junior mortgage has his mortgage on record before the institution of the suit to enforce the prior lien of the vendor, and is not made a party to that suit, he is not precluded from asserting his lien as against those who hold under the judgment; but in so doing, must satisfy their interest in the whole of the land, and not in a part only. The title of the purchaser is not, as against a subsequent incumbrance, absolute, under such circumstances. *Turner v. Phelps*, 251.

3. An averment, in effect that the mortgage was worthless, made by the junior mortgagee in a suit against attorneys for damages alleged to result from negligence in examining title, does not estop

LAND—*continued.*

him from enforcing any right resulting from the mortgage, the averment not being addressed to those claiming adversely, nor to any one else, to induce action on it in regard to the land. *Id.*

4. A conveyance from H. to V. of land, described the beginning corner, and then proceeded to direct how the lines were to be run from this point, so as to include 767 acres, but did not purport to be a conveyance of land actually surveyed or marked out: *Held*, That in a suit for the land by those claiming through this deed, the plaintiff, to entitle him to recover all the land, must show that the field-notes set out in his petition and relied on by him, commenced at the place designated in said deed. *Bell v. Vanzant*, 390.

5. By the evidence in the trial below, it was a question open to controversy as to whether the survey relied on by plaintiff commenced at the point designated in the deed from H. to V., and in this state of the evidence the court charged as follows: "Before the plaintiff can recover under this branch of the case, he must satisfy you that the land embraced in the deed from H. to V. is the same land, or some portion of the same land described in the petition." * * And again: "In ascertaining whether the land conveyed by H. to V. is the same land described in the petition, the jury should look to all the facts and circumstances detailed in the evidence. All that is required of the plaintiff is to show with reasonable certainty that the land conveyed by H. to V. is the same land, or some portion of the same land, sued for and described in the petition." *Held*. That, unexplained and unqualified, this charge, taken literally, entitled the plaintiff to recover all, on his showing title to any part of the land sued for, and was erroneous. *Id.*

LAND CERTIFICATE.

1. A colonist, with his wife, settled in Mercer's colony, in 1847, soon after which both died. The husband's estate was alone administered on, and a colony certificate for 640 acres was issued in the name of the husband, and sold by the administrator: *Held*, That if legally sold, in due course of administration, such certificate being community property, the sale passed the legal title to it, and to any land on which it might be located, from the heirs of both the colonist and his wife. *Simmons v. Blanchard*, 266.

2. Such a certificate was sold, under order of the County Court, by the administrator, on the estate of the deceased colonist in 1851, and the money paid by the purchaser; there was no formal confirmation of sale, but the same was reported by the administrator to the court, in an exhibit showing the condition of the estate, two years after which the court ordered the administrator to make title to the purchaser to a part of the land afterwards covered by the certificate, which had been patented to the heirs of the colonist. Appellees claimed the land under the original purchaser at administrator's sale: *Held*, That these facts, in connection with other un-

LAND CERTIFICATE—*continued*.

disputed mesne conveyances to appellees, constituted a right in them to the land as against the heirs of the colonist's wife. *Id.*

3. Emigration and settlement in the State constituted the leading consideration of the grant of headright land certificates; and where the head of a family died before its issuance, (or, as in this case, before the unconditional certificate had issued,) the certificate, no matter in whose name issued, would inure to the benefit of his estate. *Marks v. Hill*, 345.

LEVY.

LIEN, 11.

1. Since the act of 1846, (Paschal's Dig., arts, 987, 993,) defining the office and duties of constable, and authorizing that officer to execute process throughout the county, a constable may levy an execution on land, which though in the county, is not in the beat or precinct for which he is constable; and in so doing, it is not necessary for him to go on the land with his execution. *Cundiff v. Teague*, 475.

2. The rule in this State is, that a levy on land is not a satisfaction of the judgment, and that the possession of the debtor is not disturbed by the levy: the levy works no disseizin. *Id.*

LEVY OF EXECUTION.

A lien by levy of execution takes preference over an unrecorded deed from the judgment debtor. *Grimes v. Hobson*, 416.

LIEN.

APPEAL, 3.

JUDGMENT IN REM, 1.

JURISDICTION, 5.

MECHANICS' LIEN, 5.

PLEADING, 6, 7.

SUBROGATION, 1.

VENDOR AND VENDEE, 9, 10.

1. The mechanics' lien law of 1871, (Paschal's Dig., art. 7112,) while it authorizes a sub-contractor, or employe of the contractor, to fix a lien upon the house and lot or land which may be enforced by a judgment against the owner, after a compliance with the provisions of the statute, still it does not authorize him to recover a general judgment *in personam* against the owner for the debt claimed, to be collected out of his property generally, as other judgments rendered against him for his own debts. *Walbroff v. Scott*, 1.

2. When the account and specifications of a contract, filed and recorded by the workman, who seeks to enforce a mechanics' lien, fail to place him in the attitude of a sub-contractor, no lien can be enforced in his favor as a sub-contractor. *Id.*

3. It is not competent in the District Court to order sale by the sheriff of lands of an estate, against which the vendor's lien is enforced. The order should require the administrator to make sale. *Heath v. Garrett*, 23.

LIEN—*continued.*

4. It has been settled, by a long train of decisions, that where the vendor retains in his deed a lien for the purchase-money, he has the superior right to the land against the vendee, and those in privity with him, as long as the purchase-money remains unpaid; until the land is paid for, the vendee, and those claiming in his right as against the vendor, have merely an equitable and not the legal title to the land. *Peters v. Clements*, 114.

5. Where the vendee is in default in the payment of the purchase-money, the vendor may sue for the land and recover it, unless the vendee make good his equitable title by payment; or he may purchase his lien, and subject the land to sale for the payment of the purchase-money. *Id.*

6. Where the vendor forecloses his lien, and a third party becomes the purchaser, the vendor is estopped from controverting the title, or from taking advantage of any irregularities in the proceedings of foreclosure; and if necessary to the security of the purchaser, equity will subject him to the rights of the plaintiff or vendor. *Id.*

7. The assignee of a note secured by lien, may enforce the lien, as well as the payee, for the lien is an incident that follows the note. *Cannon v. McDaniel*, 304.

8. When different persons hold liens upon the same property, who are known, all should be made parties, if practicable, when the rights of any one of them are sought to be enforced by suit. *Id.*

9. Where a note is secured by a mortgage, the lien is not lost by bringing suit first on the note without including the lien. *Id.*

10. The plaintiff in execution acquires a fixed and certain interest in the land upon which his execution is levied, from the date of the levy, which entitles him to have satisfaction of his judgment by its sale, and which cannot be defeated or interfered with by the defendant in execution, or any one setting up a subsequent right or claim to the land through or under him. *Borden v. McRae*, 396.

11. A levy upon lands under an execution fixes a lien, which upon sale under the execution, or *venditioni exponas*, passes title against an unrecorded deed; nor is the title effected by notice after the levy and before the sale. *Id.*

12. It is not within the scope or authority of the writ of *venditioni exponas*, to subject to sale the property to which the general lien of the judgment attaches, but merely that to which a specific right or lien has been acquired by the levy of the *fieri facias*. *Id.*

13. A lien by levy of execution takes preference over an unrecorded deed from the judgment debtor. *Grimes v. Hobson*, 416.

14. *Grace v. Wade & Mains*, 35 Tex., 522, approved, holding that an unrecorded deed is void against a creditor who has acquired a specific lien or interest in the land in controversy, by the levy of an execution under judgment in a different county from that in which the land was situated, although the judgment has not been recorded in the county; and the creditor, or any one else who might pur-

LIEN—*continued.*

chase the land under the execution, would get title against the unrecorded deed, notwithstanding he might have full notice of the deed, at the time of the purchase, provided the creditor had no notice prior to the levy of his execution. *Id.*

15. The fact that land was bought at sheriff's sale, for or by a co-defendant in the execution, cannot affect the right to it, provided the creditor had a fixed lien upon the land, by levy or otherwise. *Id.*

16. Such purchase in no way diminishes his liability on the judgment, either in favor of the plaintiff in execution, or of the defendant, whose land was sold, if he paid more than his share of the judgment. *Id.*

17. When a deed is made reserving in terms a lien for the purchase-money, to be paid as specified, in notes given for the land, the vendor has the superior right to the land and to its possession, on default made by the vendee in payment of the notes. *Masterson v. Cohen*, 520.

LIMITATION.

WRIT OF ERROR, 1.

1. The statute of August 26, 1857, (Paschal's Dig., 4647-49,) seems to have been intended as a privilege and not as a limitation upon the rights of the surviving husband. If he fails to avail himself of it, he may be held to a stricter accountability than that imposed by the statute, in the settlement with those jointly interested with him in the property. In a suit for conversion in such case, limitation would run from the date of such act complained of. *Lumpkin v. Murrell*, 52.

2. An administrator sought, by motion against a law firm, to recover money collected by them, belonging to the estate. The defendants set up their services for the estate, rendered over two years before, and that they were authorized to appropriate the funds collected to the satisfaction of their claim: *Held*, Error to sustain exceptions to the plea, on the ground of the statute of limitation. *Gammage v. Rather*, 106.

3. When a defendant relies on the possession of others, anterior to his, to make out the term of ten years, required by article 17 of the Statute of Limitations, he is required to show privity between himself and those whose possession he claims as part of his title under the statute. *Truchart v. McMichael*, 222.

4. See facts held to be insufficient to support the plea of ten years' limitation. *Id.*

5. It was error to charge the jury that "by a survey and return of the field-notes and certificate to the land office the State was informed of the extent of the claim, and in that event possession for ten years would give title, upon which suit could be maintained for the land, unless the possessor had abandoned his claim under the survey." *Austin v. Dungan*, 237.

LIMITATION—*continued.*

6. Nor will the continued occupation of such abandoned part confer title under the statutes of limitation, unless the land had been located by some other claim severing it from the public domain. *Id.*

7. The State is not bound to evict parties unlawfully holding possession of public lands before granting them to others, there being nothing prohibiting the State from granting lands held in possession; the grantee from the State takes against the party in possession. *Id.*

8. The court does not hold that where possession has been held under a location and survey for the time requisite to perfect title under the statutes of limitation, that such title could be defeated by the owner of the certificate fraudulently removing the certificate and abandoning the survey. *Id.*

9. In such case, limitation is stopped by the filing of the original petition, as against the defendant. *Jones v. Burgett*, 284.

10. *Held*, That "620 acres of the headright of David Brown, situate about twelve miles north of Henderson, in the neighborhood of Bellyview," used in a tax deed, is a sufficient description of land to form a basis for five years' limitation. *Flanagan v. Boggess*, 331.

11. When a tax deed gives what, on its face, appears to be a sufficient description of the land conveyed, and there is no evidence developing any latent uncertainty, the authorities do not decide that such a deed does not satisfy the statute of limitations. *Id.*

12. This court is not prepared to hold that, to support the bar of five years' limitation, it was necessary to prove payment of taxes during the time the statute was suspended. *Id.*

13. See facts held insufficient to show that defendant, setting up title under a tax deed and five years' possession, paying taxes, &c., had adverse possession as against the plaintiff. *Id.*

14. Where the husband of one of several heirs entitled to an estate bought lands of the estate at tax sale, and afterwards the administrator of the estate called on him and offered to repay the money expended in the purchase at the tax sale, and the money was refused, the purchaser saying that "we are all interested," and postponing the settlement: *Held*, That such purchaser's possession under the tax deed would not be adverse, unless it could be shown that he repudiated the trust, and such repudiation was brought to the notice of those interested in the estate. *Id.*

LIS PENDENS.

1. Discussed; and intimation that *lis pendens* would be notice under our statutes from the filing of the bill or petition, where reasonable diligence was had to obtain service of citation, either by personal service or by publication. *Board v. T. & P. R. W. Co.*, 316.

2. County bonds must be treated as commercial paper, and their

LIS PENDENS—*continued*.

holders entitled to the privileges and immunities attaching to negotiable instruments. They are not, therefore, within the rule of *lis pendens*. *Id*.

LOCATION.

ABANDONMENT, 2.

If at the time of a location upon land on which a settler's claim is made, such settler was not so occupying the land as to give him, under the statute approved August 12, 1870, the right to purchase under its provisions, the fact that a patent was afterwards obtained by such settler will not affect the rights of the locator. *Burleson v. Durham*, 152.

MANDATORY INJUNCTION:

See allegations held insufficient to warrant its issuance. *Board v. T. & P. R. W. Co.*, 317.

MARITAL RIGHTS.

HOMESTEAD, 1, 2, 3.

MARRIAGE.

DOMICILE, 3.

REVOCATION, 1.

MARRIED WOMAN.

AUTHENTICATION, 1.

FRAUD, 2.

NOTICE, 3.

RAILWAY COMPANY.

SEPARATE PROPERTY, 2.

VENDOR AND VENDEE, 6.

WRIT OF ERROR, 1.

1. If the wife join her husband in the execution of a note for goods purchased for the wife, to replenish a stock of goods that were the separate property of the wife, such purchase would not be for the benefit of the wife's separate property in contemplation of the statute, so as to make her liable on the note. *Wallace v. Finberg*, 35.

2. The wife cannot be made liable as a partner, to pay a debt contracted in the purchase of goods, to replenish a stock of goods bought by the husband with the wife's separate means. *Id*.

3. Notwithstanding the husband and wife may assume to act as mercantile partners in trade, and the merchants with whom they deal in the purchase of goods may so recognize them in their dealings, and the attorneys who bring suits on contracts made by them in such dealings may bring or defend suits against them substantially as partners,—it is the duty of the courts, in adjudicating their liabilities, to repudiate the existence of such a relation between man and wife. *Id*.

4. In suit by attachment, when the wife's separate property is seized to secure a note made by the husband and wife, but on which

MARRIED WOMEN—continued.

the wife is not liable, she may recover the property, as any person might whose property had been illegally attached for the debt of another, by bringing suit or setting up her claim by cross-bill, under leave of the court, in the pending suit to which she had been made a party; and this she can do in her own name if her husband refuse to join her. *Id.*

5. The name of the wife being found on a promissory note conjointly with that of her husband, does not raise a legal presumption that she is, either jointly or severally, liable on it. *Harris v. Finberg*, 79.

6. The certificate of an officer to the privy examination of a married woman, who, with her husband, signs a deed, which certificate recites that the wife acknowledged in her privy examination that she signed the deed "without any bribe, threat, or compulsion" from her husband, is sufficient, if good in other respects. The words used are construed as equivalent to a declaration by the wife that she signed the deed freely and willingly, and negative the exercise of any improper influence or duress by the husband. *Belcher v. Weaver*, 293.

7. The unintentional use of one word for another by an officer in his certificate of the acknowledgment by a married woman to a deed will not affect the certificate, where the mistake obviously appears from an examination of the entire instrument. *Id.*

8. There must be a substantial, though there need not to be a literal, compliance with the terms of the statute; and although words not in the statute are used in the place of others that are, or words in the statute are omitted, yet, if the meaning of the words used is the same, or they represent the same fact, or if the omission of a word or words is immaterial, or can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be held sufficient. *Id.*

MASTER AND SERVANT.

The master is not liable for injuries sustained by his servant through the negligence or default of a fellow-servant. *Price v. H. D. N. Co.*, 535.

MEASURE OF DAMAGES.

1. A defendant in attachment, whose goods have been seized under an attachment wrongfully sued out, is entitled to recover back all the goods not necessary to satisfy the debt, or their value, if sold, together with compensation for their detention, which would ordinarily be legal interest upon the value of the whole of the property seized from the time of the levy. If the plaintiff should fail to establish his debt, then the defendant should recover back all the property seized, or, if sold, its value at the time of the levy, with legal interest thereon. *Wallace v. Finberg*, 36.

MEASURE OF DAMAGES—*continued.*

2. Where the suing out and levy of a writ of sequestration is malicious, exemplary damages may be awarded; where it is merely wrongful, without malice, actual damages only can be allowed; but in no case can the value of the defendant's time, while attending court, or any such incidental expense, be allowed as a proper element of actual damage. The establishment of any other rule would open a wide door for the admission of other expenses and losses incidental to the prosecution of rights in courts of justice, and would inaugurate a radical departure from the principles of the common law. *Harris v. Finberg*, 80.

3. In a suit against a railroad company for the alleged wrongful act of its conductor in ejecting plaintiff from a passenger car, the jury was in effect charged, that in considering the actual damage sustained by plaintiff, they would estimate the same by the injuries sustained by the plaintiff in his feelings, his person, and his estate; that they might look to plaintiff's situation in life, his reputation in the community, and any circumstances which might appear from the evidence to have attended the act complained of, but they could not take into account the wealth of defendant or the poverty of the plaintiff: *Held*, That there was no error. *Hays v. H. G. N. R. R. Co.*, 272.

4. It seems that in an action upon a contract for the delivery of personal property paid for, that interest should not be computed from the time fixed in the contract for its delivery, where a higher value at a subsequent time was adopted as the measure of damages. The interest should only be computed from the date of the valuation fixed. *Masterson v. Goodlett*, 402.

5. Where a bailee took possession of a "crib of corn," at the request of the bailor, and for his benefit, the measure of damages on the bailee for using it would be the value when taken, with interest. *Id.*

MECHANICS' LIEN.

JUDGMENT IN REM, 1.

LIEN, 1.

1. The mechanics' lien law of 1871, (Paschal's Dig., art. 7112,) while it authorizes a sub-contractor, or employe of the contractor, to fix a lien upon the house and lot or land, which may be enforced by a judgment against the owner, after a compliance with the provisions of the statute, still it does not authorize him to recover a general judgment *in personam* against the owner for the debt claimed, to be collected out of his property generally, as other judgments rendered against him for his own debts. *Waldroff v. Scott*, 1.

2. There being no special mode of proceeding pointed out for enforcing in the courts a mechanics' lien under the act of 1871, the remedy pursued should be in accordance with the general principles and practice relating to the enforcement of liens. *Id.*

PARTIES, 1.

PRACTICE, 1.

MECHANICS' LIEN—*continued.*

3. It would seem to be the proper practice for the sub-contractor, on bringing a suit against the owner to enforce his lien, to make his employer a party, so as to have adjudicated the amount of his debt at the same time, unless it had been previously adjudicated, and also to make others who had liens (if there be any) parties, to settle their validity and adjust their priority. *Id.*

4. When the account and specifications of a contract, filed and recorded by the workman, who seeks to enforce a mechanics' lien, fail to place him in the attitude of a sub-contractor, no lien can be enforced in his favor as a sub-contractor. *Id.*

5. A judgment was rendered for a sum found to be due on one of two notes, the other not being due at the time of judgment, both of which, it was claimed, were secured by a mechanics' lien on a house and fifty acres of land, to be taken out of a larger tract, "in such shape as may be fair and equitable." The judgment was rendered for the note due, and it ordered sale of the house and forty acres of land, "to be taken out of defendant's tract in as near a square shape as it may be done"—the sale to be for enough cash to discharge the note due, and on a credit for the remainder, until the other note should become due; but "if the premises should not sell for a sufficient sum to pay the entire two notes, then the sheriff shall apportion the said purchase-money ratably between the note due," for which judgment was rendered, and the note not due, and the portion rated to the note due, and for which judgment was rendered, "shall be for cash, and the remainder on a credit." It also provided that for the postponed payment the sheriff should take a lien on enough of the land sold to secure the deferred payment: *Held—*

1. Before default of payment of the first of several notes secured by mortgage, suit could be maintained for a foreclosure of a mortgage to satisfy the first note, and for a sale of the entire mortgaged premises, if the land is not properly susceptible of division.

2. The decree in such a case should be so rendered as to make equitable provision for the payment of all of the notes embraced in the mortgage lien.

3. The decree should be so shaped, if the matter is not at once concluded by a rebatement of the interest on the notes not due, that the court should have control of the case and the title of the land until the notes secured by the mortgage lien are all satisfied. A judgment ordering a sale by the sheriff, and requiring him to take a lien on the land sold to secure a deferred payment, is error. If that practice were permitted, another suit to collect the purchaser's note would be necessary in case of default.

4. The description of the land in the decree was defective, for want of certainty. The boundaries of the tract of which the

MECHANICS' LIEN—*continued.*

sheriff was to place the purchaser in possession should not be left to the sheriff, nor to adjustment between the purchaser and the owner of the remainder of the tract.

5. The evidence to establish a mechanics' lien (see Statement of the Case) was not presented in a way to conform to either of the modes of fixing a lien prescribed in the statute. (Paschal's Dig., arts. 7112, 7115.) The note sued on, executed after the work was finished, was not a contract for the building of a house. If regarded as a claim under a verbal contract, it was not sufficient to fix a lien, because it was not shown that a copy of it had been served on the defendant, as required by statute.

6. The provisions of the statute must be complied with substantially in every respect, in order to fix a mechanics' lien on the homestead. *Tinsley v. Boykin*, 592.

MISTAKE.

CHARGE OF COURT, 8.

The unintentional use of one word for another by an officer in his certificate of the acknowledgment by a married woman to a deed will not affect the certificate, where the mistake obviously appears from an examination of the entire instrument. *Belcher v. Weaver*, 294.

MONEY.

PRINCIPAL AND AGENT, 6.

MORTGAGE.

ADMINISTRATION, 3, 4.

LIEN, 9.

ESTATES OF DECEDENTS, 8. VENDOR AND VENDEE, 18.

1. If the holder of the junior mortgage has his mortgage on record before the institution of the suit to enforce the prior lien of the vendor, and is not made a party to that suit, he is not precluded from asserting his lien as against those who hold under the judgment; but in so doing, must satisfy their interest in the whole of the land, and not in a part only. The title of the purchaser is not, as against a subsequent incumbrance, absolute, under such circumstances. *Turner v. Phelps*, 251.

2. An averment, in effect, that the mortgage was worthless, made by the junior mortgagee in a suit against attorneys for damages alleged to result from negligence in examining title, does not estop him from enforcing any right resulting from the mortgage, the averment not being addressed to those claiming adversely, nor to any one else, to induce action on it in regard to the land. *Id.*

MOTION.

DAMAGES, 4.

LIMITATION, 2.

OFFICER, 2.

A motion, with reference to a suit pending in the Supreme Court.

MOTION—*continued*.

should, when filed at the instance of an attorney for the party in whose behalf it is made, be signed by him. No uniform rule having been established on this subject by the court, a motion not signed is considered, which contains in the body of the motion the name of the counsel and indicates the parties for whom he appears. *Simmons v. Fisher*, 126.

MUNICIPAL CORPORATIONS.

DAMAGES, 12, 13, 14, 15, 16.

1. It is competent for a city council, when a charter authorizes a railroad company to build the road "under such conditions and ordinances as the mayor and aldermen of said city may provide and require," to release the railroad company from an obligation "to construct and keep in good repair all cross-culverts whenever the same may be required under their rail-tracks." *Galveston v. G. C. R. R. Co.*, 435.

2. Both parties having acted upon an ordinance, is sufficient reason for its support. *Id.*

3. The voluntary labor and expenditure by a city upon a work, the performance of which, by the railroad company, had been released, without calling upon the company to do the work, will not sustain an action, by the city, for labor and expenditure which were voluntary, even if the release by the city was without consideration. *Id.*

4. If a contract has been obtained by mistake, or if through change of circumstances, it is deemed to operate oppressively, an agreement to make an additional compensation, or to annul or modify it, is not invalid for want of consideration. *Id.*

NEGLIGENCE.

1. In a suit for damages against a railway company on account of the alleged negligence of its agents, it is not necessary that the petition should negative, either by facts stated or by direct averment, the existence of contributive negligence on the part of plaintiff; an exception to this rule exists when the petition, from its averments, would establish, if unexplained, a *prima facie* case of negligence of the party injured. *T. & P. R. W. Co. v. Murphy*, 356.

2. Negligence, in one sense, is a quality dependent upon, and arising out of, the duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of said duties and relations. *Id.*

3. In the absence of law defining the acts which constitute negligence, it is a fact to be found by the jury on evidence, and it is error to instruct a jury as to what acts constitute negligence when the law is silent as to such acts. *Id.*

4. Acts of negligence may be of a character so extreme and so

NEGLIGENCE—continued.

clearly established by uncontradicted evidence that this court would not on appeal disturb a verdict rendered on a charge in which the court below had departed from the statute and instructed the jury that such acts constituted negligence; but in such case it must appear manifest that he who complains of the charge had not been injured by it. *Id.*

5. When by statute a specific duty is imposed on a railway company in regard to the running and management of its train, a breach of such duty by which one receives personal injury, may be declared in a charge of the court as matter of law to be wrongful or negligent. *Id.*

6. An employe of a railroad company, knowing of a change in the arrangement for running the train, and not objecting to it, and where such arrangement is made by the consent and for the convenience of the employes, cannot complain of the increased risk occasioned by such arrangement. *Robinson v. H. & T. C. R. W. Co.*, 540.

7. A servant cannot recover damages from the master, for an injury sustained by reason of the negligence of a fellow-servant. *Id.*

8. The negligence of a servant of a railway company of one grade is as much one of the risks of the business as that of another; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants, and not those of another class. *Id.*

NEGOTIABLE INSTRUMENTS.

COUNTY BONDS, 1.

NEW SECURITY.

PLEADING, 6, 7.

NEW TRIAL.

1. Whilst courts should be slow to interfere with the verdict of a jury on a claim for damages, when the measure of damages is indefinite, they should not hesitate to do so when the error in the verdict is manifest. *Darcy v. Turner*, 30.

2. If the petition of one against whom a judgment has been rendered in an ordinary action at law, states good equitable grounds for setting aside the judgment, exceptions to it, for want of equity, should be overruled, not for the purpose of granting a new trial in the former proceeding, but that the pending proceeding in equity might be tried as an original proceeding, seeking relief against a judgment at law. If the equitable grounds set forth are not sufficient to set aside the judgment, the petition would be dismissed on exceptions, and the former judgment left in force to be executed as a valid judgment. *Roller v. Wooldridge*, 485.

NOTARY PUBLIC.

A certificate of acknowledgment of a notary public, beginning "The State of Texas, county of Hopkins," which recites the appearance of the parties before the "undersigned authority," and closes as follows, viz: "witness my hand and official seal, at Douglass, this 6th day of October, A. D. 1854, (signed) John B. Clute, Notary Public, N. C.," and in other respects formal, is good; the discrepancy between the county named in the outset and the initial letters appended to his signature is not of sufficient importance to invalidate the record. *Blythe v. Houston*, 67.

NOTE PAYABLE IN PROPERTY.

The obligation given for the purchase-money under such circumstances, and transferred to the holder of the prior lien, is, in an action by him, subject to the same defense as if owned by the original obligee. *Griffeth v. Hanks*, 217.

NOTICE.

BONA FIDE PURCHASER, 1.

LIEN, 11.

PURCHASER, 1, 2, 3, 4, 6.

1. The entry upon the records of deeds of an instrument not legally authenticated for record, has no effect as notice. *Peters v. Clements*, 114.

2. Subsequent purchasers are bound by the recitals in the deeds through which they claim, and are held to have had notice of whatever equities are apparent in the line of their title. *Id.*

3. A married woman cannot avoid a deed to which her separate acknowledgment appears to have been taken by a competent officer, in the terms of the law, on account of the deception and fraud practiced on her by her husband in procuring her signature; or the failure of the officer to acquaint her with the contents of the instrument, in the absence of evidence tending to charge those claiming under the deed with notice. *Pool v. Chase*, 207.

4. Where a vendor represented that the subject of sale was free from incumbrance, save a small and inconsiderable balance of an amount, secured by a deed of trust on the property sold, which representation was false as to the amount, in an action for the purchase-money, that fact being shown, its effect is not impaired by showing that the vendee, having notice of the incumbrance, could have ascertained its amount by inquiry. *Griffeth v. Hanks*, 217.

5. Discussed: and intimation that *lis pendens* would be notice, under our statutes, from the filing of the bill or petition, where reasonable diligence was had to obtain service of citation, either by personal service or by publication. *Board v. T. & P. R. W. Co.*, 316.

OFFICER—OFFICE.

DAMAGES, 8.

PUBLIC OFFICER, 1.

TAX COLLECTOR, 1.

TAXES, 1.

SEQUESTRATION, 6.

1. A tax collector does not occupy toward the State the relation of a mere bailee for hire, who is responsible only for such care of the public money as a prudent man would take of his own; he is bound to account for and pay over the public money that he collects, less his commission, or his securities may pay it for him. *Boggs v. The State*, 10.

2. No recovery can be had, on motion, against an officer who levies an attachment, for failure to take a sufficient replevy bond. *Cooper v. Harris*, 189.

ORDINANCE.

RELEASE, 2.

PAROL EVIDENCE.

AGENT, 6.

EVIDENCE.

1. Where the uncertainty of description in a deed does not appear from the face of the deed, but arises from extraneous facts, parol evidence is admissible to remove or explain it. *Kingston v. Pickins*, 99.

2. In such cases, the deed should be admitted, together with the parol evidence; the identity of the land is then a mixed question of law and fact. *Id.*

3. See a description, though vague and uncertain, held admissible, with other evidence to identify the land intended to be conveyed. *Id.*

4. See a discussion of contradictory calls, with reference to ascertaining the meaning of the conveyance. *Id.*

5. A receipt for a crib of corn, being exhibited as evidence against the maker of it, with parol evidence of its dimensions and a calculation of its capacity, does not preclude the bailee from showing by parol the actual contents of the crib: and *Held*, Error to exclude such testimony. *Masterson v. Goodlett*, 402.

PARTIES.

ABATEMENT.

FORECLOSURE, 1, 5.

JUDGMENT IN REM, 1.

LIEN, 1.

PRACTICE, 23, 24.

PRACTICE IN SUPREME COURT, 6, 8.

WRIT OF ERROR, 3.

1. It would seem to be the proper practice for the sub-contractor, on bringing a suit against the owner to enforce his lien, to make his employer a party, so as to have adjudicated the amount of his debt at the same time, unless it had been previously adjudicated, and also to make others who had liens (if there be any) parties, to settle their validity and adjust their priority. *Waldroff v. Scott*, 1.

PARTIES—*continued.*

2. Proceedings by suit, judgment, and sale to enforce the vendor's lien against the vendee, do not conclude the rights of a purchaser who had a deed and was in possession at the institution of the suit. *Peters v. Clements*, 115.

3. In a suit against a purchaser from a vendee, of land on which the vendors' lien rested, and of which such purchaser is affected with notice, the defendant has the right to redeem, or to have the original vendee made a party, and others, who may be purchasers, and have their equities adjusted. *Id.*

4. In such suit it was error to instruct the jury that both plaintiff, who claimed under the purchase under decree enforcing the vendors' lien, and the defendant, holding by purchase of vendee before suit, held under the original vendee; and that defendant, not being party to the suit enforcing the lien, was on that account entitled to recover. *Id.*

5. When different persons hold liens upon the same property, who are known, all should be made parties, if practicable, when the rights of any one of them are sought to be enforced by suit. *Canon v. McDaniel*, 305.

6. In a suit by tax-payers of a county, to annul proceedings of the County Court authorizing the issuance of bonds of the county, and to enjoin the collection of taxes to pay interest on such bonds, the bondholders are necessary parties. *Board v. T. & P. R. W. Co.*, 316.

7. The allegation that county bonds had been fraudulently issued and delivered to the railroad company, and by it had been passed to parties, with full notice of the fraud, will not obviate the necessity of bringing the bondholders before court as parties. *Id.*

8. To confer power to annul such bonds, the holders should be parties, and the instruments brought under the control of the court, so as to await its action upon their validity, &c. Courts do not sit to determine abstract principles, but to decide practical issues, and to settle issues in which the litigants have a substantial or immediate interest. *Id.*

9. Nor will the court, as against the railroad, annul the bonds, as against the county, and adjudge that payment therefor be provided by the railroad; such action would impair the rights of the bondholders. *Id.*

10. A decree of foreclosure does not conclude a purchaser whose rights to the property were known before the commencement of the foreclosure proceedings. *Wright v. Wooters*, 380.

11. The citizens of a county have no such legal right, in the locality of a county seat, as will enable them to bring a suit to prevent a change of it by the authorities appointed by law to act on that subject. *Worsham v. Richards*, 441.

PARTITION.

BOUNDARY, 1.

PARTNERSHIP.

MARRIED WOMAN, 3.

PLEADING, 10, 11, 12.

1. The wife cannot be made liable as a partner, to pay a debt contracted in the purchase of goods, to replenish a stock of goods bought by the husband with the wife's separate means. *Wallace v. Finberg*, 35.

2. Notwithstanding the husband and wife may assume to act as mercantile partners in trade, and the merchants with whom they deal in the purchase of goods may so recognize them in their dealings, and the attorneys who bring suits on contracts made by them in such dealings may bring or defend suits against them substantially as partners,—it is the duty of the courts, in adjudicating their liabilities, to repudiate the existence of such a relation between man and wife. *Id.*

PAYMENT.

PRINCIPAL AND AGENT, 3, 4, 7.

An executed contract for a substitute in the C. S. army, after performance, is effectual in support of payment under a plea of innocent purchaser. *Peters v. Clements*, 114.

PAYMENT IN CONFEDERATE STATES NOTES.

Such payment held good, where made by the maker of a promissory note to the payee, who, as agent, sold the maker of the note land for which the note was executed, in the absence of notice from the owner of the land, that payment to the agent (the payee of the note) would be in fraud of the rights of such equitable owner. *Rodgers v. Bass*, 506.

PLEADING.

ABATEMENT.

AMENDMENT.

ATTACHMENT, 6, 9.

DAMAGES, 7.

NEGLIGENCE, 1.

PRACTICE, 25.

RAILWAY COMPANY, 2.

SEQUESTRATION, 1, 5.

1. A plea in reconvention, alleging that the property seized was not the property of defendant, but that by its seizure the defendant was delayed in moving his family, put to additional expense, and that his family, from the delay, was exposed, and sickness was caused by the exposure, causing an outlay of money in medical bills, loss of time of defendant and of his family : *Held*, To show no cause of action. *Pinson v. Kirsh*, 26.

2. The deterioration in quality and the damages in the price of goods wrongfully seized under attachment, should be pleaded by a defendant specially, since they are not necessary results from an attachment, in order that the opposite party may be prepared, if he can, to meet the evidence offered to establish such contingent injury; and in a suit against husband and wife, where their defenses

PLEADING—*continued.*

were conflicting, each asserting claim of ownership to the property seized, and the wife alone pleading special damage, the husband will not be entitled to recover on the special plea. *Wallace v. Finberg*, 36.

3. Where such purchaser, under decree of foreclosure, brought trespass to try title against a prior purchaser, the equities which the plaintiff had as against the land, by his owning the judgment, by virtue of his purchase of the land and payment of the judgment, cannot be litigated. By proper pleadings, the plaintiff can enforce his equities against the land. *Carter v. Attoaway*, 108.

4. See this case for allegations held insufficient to charge defendant as a trustee. *Hendrix v. Nunn*, 142.

5. Allegations of fraud must specify the acts insisted on as fraudulent. *Id.*

6. A petition alleging the execution of a promissory note by the vendee and others, for the purchase-money of land, is insufficient to support a judgment enforcing the vendors' lien against such land. *Faver v. Robinson*, 204.

7. Where the lien is claimed in addition to such other security, it must be alleged and proved that the lien was not waived by the taking of such other security. *Id.*

8. The appropriate use of an amendment to the petition is to give a more full and clear statement of the cause of action alleged in the original; and a definite description of land, against which it is sought to enforce the vendors' lien, may be given by amendment. *Spencer v. McCarty*, 213.

9. The "promise" to pay is sufficiently alleged where the execution and delivery of a promissory note are alleged, and the note made part of the petition. *Id.*

10. In a suit by a surviving partner on an obligation for a debt belonging to the partnership, but in his own name, the defendant can set off a partnership claim held by him. By the rule that "the debts must be mutual between the parties," is meant the real, and not merely the nominal, plaintiff and defendant. *Masterson v. Goodlett*, 402.

11. This is the rule, without reference to the solvency or insolvency of the members composing the firm. *Id.*

12. The authorities go further, and hold that if the demand sued on was the individual property of the survivor of a firm, the defendant would have the right to set off a partnership debt held by him against the firm. *Id.*

13. Under our system of practice, which permits the plaintiff, after giving a full statement of his cause of action, to add such allegations, pertinent to the cause, as he may think necessary to maintain his suit, a history of the facts out of which plaintiff's rights are supposed to grow, is often given, which may embrace several causes of action, perfectly or imperfectly stated, with prayer for alternative relief. When such a petition is excepted to, in such way as to test

PLEADING—*continued.*

the plaintiff's right, under every aspect of his case, to any of the relief prayed for, it is the duty of the court—

1. To ascertain what combination of facts can be found stated in the petition which will constitute a cause of action, responsive to the prayer for general relief, or to any prayer for special relief.

2. To sustain the petition as containing a good cause of action, if such a combination of facts can be found stated, though all the other facts stated may be liable to the exception taken, and must thenceforth be treated as surplusage.

3. To sustain the petition only when the facts stated, giving a cause of action, stand in consistent harmony, when separately and conjointly considered, in connection with other facts stated.

Edgar v. Galveston City Co., 421.

14. See opinion, for facts stated in a petition which constitute a good cause of action in trespass to try title. *Id.*

15. In trespass to try title, the plaintiff claimed, as purchaser at execution sale, under a judgment obtained by himself against the defendant. The defendant pleaded the want of actual notice of the proceeding under which the judgment was obtained, (which was rendered after service by publication;) that the claim sued on was fraudulent and unjust, (specifying in what,) and prayed that the judgment be vacated: *Held*, That the parties being the same in both proceedings, the averments of the answer were sufficient to support it as a bill of review; and if properly supported by evidence, to authorize the reopening of the judgment, and the setting aside the sale of the land. *Cundiff v. Teague*, 475.

16. If the plaintiff in attachment desires to have the question of his homestead right in property attached settled, in the attachment suit, he should make such amendmends to his pleadings as will give the defendant notice that he is called upon to defend his homestead rights, and, on principle, it would seem that his failure to assert such rights would be an admission that he had none. *Willis v. Matthews*, 479.

17. A petition in equity, which seeks to enjoin a judgment, upon the ground that the plaintiff's counsel had, in the proceedings on which the judgment was rendered, consented, without authority, to give a lien upon land upon a part of which the plaintiff alleged his homestead was situated, would, if true, entitle him to be relieved, if at all, only to the extent of the homestead. As to the other lands specified in the judgment, it might, in the absence of averment to the contrary, have been a lien, without it being so stipulated in the judgment. *Roller v. Wooldridge*, 485.

POSSESSION.

PARTIES, 2.

VENDORS' LIEN, 1.

1. When a defendant relies on the possession of others, anterior

POSSESSION—*continued.*

to his, to make out the term of ten years, required by art. 17 of the Statute of Limitations, he is required to show privity between himself and those whose possession he claims as part of his title under the statute. *Truchart v. McMichael*, 222.

2. It was error to charge the jury that "by a survey and return of the field-notes and certificate to the land office the State was informed of the extent of the claim, and in that event possession for ten years would give title, upon which suit could be maintained for the land, unless the possessor had abandoned his claim under the survey." *Austin v. Dungan*, 237.

3. Nor will the continued occupation of such abandoned part confer title under the statute of limitation, unless the land had been located by some other claim severing it from the public domain. *Id.*

4. The State is not bound to evict parties unlawfully holding possession of public lands before granting them to others, there being nothing prohibiting the State from granting lands held in possession, the grantee from the State takes against the party in possession. *Id.*

5. The court does not hold that where possession has been held under a location and survey for the time requisite to perfect title under the statutes of limitation, that such title could be defeated by the owner of the certificate fraudulently removing the certificate and abandoning the survey. *Id.*

6. See facts held insufficient to show that defendant, setting up title under a tax deed and five years' possession, paying taxes, &c., had adverse possession as against the plaintiff. *Flanagan v. Bog-gess*, 331.

7. Where the husband of one of several heirs entitled to an estate bought lands of the estate at tax sale, and afterwards the administrator of the estate called on him and offered to repay the money expended in the purchase at the tax sale, and the money was refused, the purchaser saying that "we are all interested," and postponing the settlement: *Held*, That such purchaser's possession under the tax deed would not be adverse, unless it could be shown that he repudiated the trust, and such repudiation was brought to the notice of those interested in the estate. *Id.*

8. The rule in this State is, that a levy on land is not a satisfaction of the judgment, and that the possession of the debtor is not disturbed by the levy: the levy works no disseizin. *Cundiff v. Teague*, 476.

POWER OF ATTORNEY.

A power of attorney to sell and convey all lands owned in the State of Texas by the principal, invests the agent with power to sell any specific tract in the State to which his principal may have title. *Baxter v. Farborough*, 231.

POWER.

TRUST AND TRUSTEES, 7, 8.

PRACTICE.

ATTACHMENT, 3.

AUDITOR, 1.

COSTS.

DAMAGES, 4, 5.

DEMURRER.

ESTATES OF DECEDENTS, 3, 4, 5.

EVIDENCE.

EXECUTOR, 1.

FORECLOSURE, 9.

JUDGMENT IN REM, 1.

MECHANICS' LIEN, 3.

PAROL EVIDENCE, 2.

PLEADING, 13.

PRACTICE IN DISTRICT COURT.

PRACTICE IN SUPREME COURT,
12, 17, 18.

PRINCIPAL AND SURETY.

SEQUESTRATION, 2.

SHERIFF, 1, 3.

TRIAL BY JURY, 1.

WAIVER, 5.

1. There being no special mode of proceeding pointed out for enforcing in the courts a mechanics' lien under the act of 1871, the remedy pursued should be in accordance with the general principles and practice relating to the enforcement of liens. *Waldroff v. Scott*, 1.

2. No judgment can be rendered in favor of one claiming against an executor, after exceptions are sustained to his answer, on an assumed confession of the facts alleged in the petition. The facts on which a claim of right against the estate is based must be sustained by evidence. *Hendrix v. Hendrix*, 6.

3. In a suit by the State against an officer on his official bond, the cause of action survives against the securities on the death of their principal, and upon the suggestion of the principal's death the cause may proceed against the securities without alleging or proving the insolvency of the principal. *Boggs v. The State*, 10.

4. A party has a right to specially object to any item allowed by, or disallowed, or to any conclusion arrived at, by an auditor, as exhibited in his report, and have the verdict of a jury thereon in response to evidence adduced on the trial of the case. In the absence of such objections it is not error for the court to charge, that the report of the auditor is conclusive, nor does such practice contravene the right of the party to a trial by jury. *Id.*

5. Only such objections as go to the form and manner of taking depositions are required to be made in writing, and notice thereof given before the trial. Objections to the answers of witnesses made in depositions as hearsay, secondary, or irrelevant evidence, may be made when the testimony is offered. *Woosley v. McMahan*, 62.

6. An administrator sought, by motion against a law firm, to recover money collected by them, belonging to the estate. The defendants set up their services for the estate, rendered over two years before, and that they were authorized to appropriate the funds collected to the satisfaction of their claims: *Held*, Error to sustain exceptions to the plea, on the ground of the statute of limitation. *Gammage v. Rather*, 106.

PRACTICE—*continued.*

7. The pleadings not admitting that the defendant held by purchase prior to the commencement of the suit to foreclose, it was not error to admit the decree and sale made under it, when offered as evidence of title. *Carter v. Attoway*, 108.

8. A motion which, in terms, asks an arrest of judgment, on the ground that there is nothing in the verdict which shows that it was rendered against any party to the suit, is, in legal effect, a motion to set aside the verdict; and the action of the court below, on such a motion, which pronounces the judgment "arrested," leaves the case standing in court as if it had never been tried; such action of the court is not a final judgment from which an appeal can be taken. *Morehead v. I. R. R. Co.*, 178.

9. No recovery can be had, on motion, against an officer who levies an attachment, for failure to take a sufficient replevy bond. *Cooper v. Harris*, 189.

10. Where a note is copied into the petition, or attached thereto as an exhibit, there can be no variance when the note is offered in evidence. *Spencer v. McCarty*, 213.

11. A party accepting service of the petition, and waiving process, does not thereby waive his right to defend the action. *Kennedy v. McCoy*, 220.

12. Where service of citation was waived and the petition was not filed by the first day of the term, it was error to take judgment by default at such term. *Id.*

13. When by amendment an allegation is made of such a nature that the defendant should be served with notice, and such service was had by publication, there being no appearance, the proceedings will be considered as if in a "suit by publication," and unless the record contain a statement of facts, such judgment will be reversed. *Hewitt v. Thomas*, 232.

14. After both parties to a suit have announced ready for trial, and exceptions to the petition have been overruled, it is in the discretion of the court whether the plaintiff will be permitted to amend, and again give a full statement of his cause of action—such amendment not having been rendered necessary by the ruling of the court. *Hays v. H. G. N. R. R. Co.*, 272.

15. The allegation that county bonds had been fraudulently issued and delivered to the railroad company, and by it had been passed to parties, with full notice of the fraud, will not obviate the necessity of bringing the bondholders before court as parties. *Board v. T. & P. R. W. Co.*, 317.

16. To confer power to annul such bonds, the holders should be parties, and the instruments brought under the control of the court, so as to await its action upon their validity, &c. Courts do not sit to determine abstract principles, but to decide practical issues, and to settle issues in which the litigants have a substantial or immediate interest. *Id.*

PRACTICE—continued.

17. Nor will the court, as against the railroad, annul the bonds, as against the county, and adjudge that payment therefor be provided by the railroad; such action would impair the rights of the bondholders. *Id.*

18. An equitable estoppel may be proven under a plea "not guilty," in trespass to try title. *Mayer v. Ramsey*, 371.

19. The return of the execution exhibiting an unsatisfied levy, and thereby showing property of the defendant in *custodia legis* for the satisfaction of the judgment, not only authorizes, but requires, that proper process shall issue for its disposal. This process is the writ of *venditioni exponas*. *Borden v. McRae*, 396.

20. If the petition of one against whom a judgment has been rendered in an ordinary action at law, states good equitable grounds for setting aside the judgment, exceptions to it, for want of equity, should be overruled, not for the purpose of granting a new trial in the former proceeding, but that the pending proceeding in equity might be tried as an original proceeding, seeking relief against a judgment at law. If the equitable grounds set forth are not sufficient to set aside the judgment, the petition would be dismissed on exceptions, and the former judgment left in force to be executed as a valid judgment. *Roller v. Wooldridge*, 485.

21. In an equitable proceeding to set aside a judgment rendered in a proceeding at law, the practice of having two trials—one to determine whether the judgment shall be set aside, and the other to retry the original suit after the judgment rendered in it has been set aside—is not adapted to our mode of procedure, in which all the material facts must be submitted to a jury, when the same is demanded, whether the suit involves matters of law or equity. *Id.*

22. In suits for damages for wrongfully suing out and levying a writ of sequestration, it is proper practice to make the sureties on the sequestration bond parties defendants. *Tompkins v. Toland*, 584.

23. The sureties have an immediate and direct interest in the amount of damages for which they are bound, being properly ascertained, and so they are proper parties to a suit by which this is to be done. *Id.*

24. A plaintiff who sues for land, the title to which is in an intervenor in the same suit, is not entitled to recover by reason of the fact that the petition of intervention united with plaintiff in the prayer, that title to the land might be decreed in plaintiff. No such effect can be given to such a plea; and suits must be brought in the name of the party legally or equitably entitled. *Browning v. Atkinson*, 606.

PRACTICE IN DISTRICT COURT.

COSTS, 1.

DAMAGES, 2.

NEW TRIAL, 2.

PRACTICE, 1.

VENDOR AND VENDEE, 1.

WAIVER, 3, 4.

WITNESS, 1.

PRACTICE IN DISTRICT COURT—*continued*.

1. In a suit upon a rejected claim against an estate, the withdrawal of an answer and consent to judgment by the administrator, is considered equivalent to an approval of such claim. *Heath v. Garrett*, 23.

2. Upon the withdrawal of an answer in a suit upon such rejected claim, judgment by default final may be rendered, if the claim be liquidated and proved by an instrument of writing; the clerk computing damages as in other cases. *Id.*

3. The refusal of a court, at a former term, to sustain exceptions to imperfect pleadings is not a reason for adhering to such ruling when again urged at a subsequent term. *Woosley v. McMahan*, 63.

4. At a term of court after judgment, the court, on motion of the party against whom costs had been adjudged, ordered a retaxation of the costs, excluding certain witness fees for informality of taxation; the costs were immediately paid to the clerk as retaxed; after this, during the same term, the costs were, on motion, again adjudged to be retaxed, so as to include the witness fees, the informality of the first taxation having been cured by the affidavits of the witnesses and the clerk's certificate. There was no effort made to show that the charges of the witnesses were excessive or unfounded: *Held*, That the payment of the costs under the first order did not preclude the subsequent judgment, which must be held, in the absence of testimony contradicting the clerk's certificate and the affidavits of the witnesses, to be correct. *H. & G. N. R. R. Co. v. Jones*, 134.

5. A charge not applicable to the facts in evidence is properly refused, however correct as a principle it may be. *Norvell v. Phillips*, 162.

6. It can be no ground of complaint that necessary parties to a suit are allowed to make themselves parties, as intervenors, at their own instance. *Id.*

7. Questions, and answers thereto, relating to matters of opinion or of law, may be objected to, when offered; such objections do not relate to the manner and form of taking and returning depositions. *Purnell v. Gandy*, 191.

8. The letter of the statute (Paschal's Dig., 1500) authorizes the dismissal of the case when a rule has been regularly entered requiring the plaintiff to give security for costs, if the security is not given on or before the first day of the next term after the rule. By a liberal construction of the statute, it is held that the rule may be complied with after the first day, if done before the case is dismissed. *Cook v. Ross*, 263.

9. It is not error, for which, on appeal, a reversal will be had, to refuse to postpone a case when reached, in which a rule for costs has been entered, for the purpose of enabling the plaintiff to comply with the rule, or to overrule a motion to reinstate such case after the order of dismissal. *Id.*

10. If plaintiff and his leading counsel were both sick and un-

PRACTICE IN DISTRICT COURT—*continued*.

able to attend to business when the case was called, that fact, if presented at the time, might be a reason for postponing the case, and allowing further time for complying with the rule. *Id.*

11. An amendment correcting the description of a call made for the beginning corner of the field-notes of a tract of land sued for, and which amendment is but a better description of the same tract of land claimed in the original petition, is not a new suit. *Jones v. Burgett*, 284.

12. The court should not receive a verdict which fails to find material issues submitted in the charge. *Kerr v. Hutchins*, 385.

PRACTICE IN SUPREME COURT.

AFFIRMANCE ON CERTIFI-

CHARGE OF COURT, 12.

CATE.

JURISDICTION, 4.

APPEAL.

WRIT OF ERROR.

BILL OF EXCEPTIONS, 1, 2.

1. Where a statement of facts, filed in case of appeal, is not signed by counsel, but is properly signed by the presiding judge, it will be presumed that it was made in that form because of the disagreement of counsel; and when the statement of facts is only certified to by the judge, as containing "all the evidence material in the case," the statutory meaning of the certificate is not thereby changed by such qualifying words. *Darcy v. Turner*, 30.

2. When the assignment of errors points out no specific error, this court will not reverse, except for errors manifest in the record, going to the foundation of the action, or because the judgment appears to have resulted from manifest error, and to be in its effects too grossly inequitable to receive the sanction and approval of a court of justice. *Lumpkin v. Murrell*, 51.

3. The admission of improper testimony over objections properly taken is cause of reversal, unless it appears that the testimony was immaterial. *Woosley v. McMahan*, 63.

4. A motion, with reference to a suit pending in the Supreme Court, should, when filed at the instance of an attorney for the party in whose behalf it is made, be signed by him. No uniform rule having been established on this subject by the court, a motion not signed is considered, which contains in the body of the motion the name of the counsel, and indicates the parties for whom he appears. *Simmons v. Fisher*, 126.

5. A motion was made to dismiss a writ of error because the same was sued out more than two years after the date of the judgment. The petition in error alleged that one of the plaintiffs in error, who was a married woman, had continued a *feme covert* until the suing out of the writ, and that her co-defendant in the court below died before the date of the judgment, leaving two minor children, who remained minors until married, in less than two years before suing out the writ, which statements were not contested: *Held*, 1, That,

PRACTICE IN SUPREME COURT—*continued.*

even had it been shown that those who were alleged to have been minors were not such, the petition in error could be maintained by the *feme covert* and her husband; the statute of limitation did not run against her during marriage; 2, That one of two or more defendants in a judgment may sue out a writ of error. *Id.*

6. Though there is no statute expressly authorizing the widow and heirs, or an administrator of the estate of a party to a judgment, who dies, to sue out a writ of error, the right exists as resulting from the right of appeal, which is secured by law. In the absence of a statute prescribing an appropriate mode of obtaining a review of proceedings on appeal, it is competent for the court to supply the deficiency by adopting proper rules upon the subject. *Id.*

7. When facts are stated in a petition in error which are contested by answer of the opposite party, the Supreme Court has power, under sec. 2, art. V of the Constitution of 1876, to hear affidavits on which it can properly determine the exercise of its own jurisdiction. *Id.*

8. When the widow of one against whom judgment has been rendered in the District Court refuses to join her children and heirs in applying for a writ of error, there is no impropriety in her being made a defendant by the heirs. *Id.*

9. When, by the bill of exceptions, it is not shown that the testimony was, under no circumstances, admissible, the court will suppose that the court below would have made the proper ruling, had the objection been insisted on to the testimony, so far as it seems objectionable. *Norvell v. Phillips*, 162.

10. When no specific error is assigned to the charge of the court, and there is no error of a controlling nature manifest, this court will not critically examine the charge to ascertain if it is in every respect accurate. *Id.*

11. When a judgment is not warranted by the pleadings, but is of such a nature that it cannot affect the party complaining, it will be considered a mere irregularity, and no cause for reversal. *Id.*

12. The fact that the relief granted has not been exhaustive, but further action was not asked by either party, is not ground of reversal. *Id.*

13. The act to regulate proceedings in the Supreme Court, of April 2, 1874, which provided that when a party is unable to file in the Supreme Court the transcript of a case, in the time limited by the statute, from any unavoidable cause, the court shall, upon satisfactory proof thereof, permit such transcript to be filed at a later period, conferred, in that, no new right, but was in accordance with the practice of the Supreme Court, founded on a former statute. (See *Paschal's Dig.*, arts. 1589, 1590.) *Hunt v. Askew*, 247.

14. Though the statute nowhere expressly authorizes or requires the appellee to file the transcript of a record at any time, it requires the clerk of the District Court to give to either party who may apply

PRACTICE IN SUPREME COURT—*continued.*

for it an attested copy of the record; and it has been the practice of the court to allow the appellee to file the transcript, when filed on or before the first day of the assignment without his right to do so being questioned; but if he fails to do so, no practice recognizes his right to file it afterwards, on showing good reason for not filing it sooner, as the appellant is authorized to do. *Id.*

15. When a complete transcript is filed by appellee, in place and as a substitute for a certificate, and it is found to contain those parts of a case which are required to be certified to in a certificate, it may be acted on by the Supreme Court as such; and for that purpose, may be filed without asking leave of the court. *Id.*

16. Either party has a right to apply for and obtain an attested copy of the record, and file it in the Supreme Court for its adjudication, within the time prescribed, but neither party has a right to rely on the other party to do it. Neither party is bound to file it after obtaining it, unless it should suit his own wishes to do so. *Id.*

17. An erroneous ruling, in admitting evidence, authorizes a reversal when it may have operated to the prejudice of the party complaining, but not otherwise. *Flanagan v. Boggyess*, 330.

18. Where the exclusion of testimony is claimed to be erroneous, the party injured should show, by bill of exceptions, what objections were made to the testimony, and why it was excluded. *Id.*

19. In the absence of the charge of the court in the record, from its loss or otherwise, it will be presumed that the law applicable to the case was correctly given, and that the verdict was in accordance with the law as charged. *Robinson v. H. & T. C. R. W. Co.*, 540.

PRE-EMPTION.

VENDOR AND VENDEE, 17.

Under said statute, the "settler," "actual settler," "*bona fide* settler," on whom is conferred the privilege of purchasing land of the State, is described in terms similar to those used in the pre-emption laws previously existing; and the statute intends to give such right of purchasing to him only who occupies public land as a residence or with a view to residence. *Burleson v. Durham*, 153.

PRESUMPTION.

ADMINISTRATION, 5.

PRINCIPAL AND AGENT, 2, 3, 4,

PRACTICE IN SUPREME COURT, 6, 7.

1.

PROBATE MATTERS, 4, 5.

1. By the XIVth Article of the Provisional Government of Texas, all land commissioners were ordered forthwith to cease their operations during the unsettled condition of the country. That article went into force on the 13th day of November, 1835, after which date any title issued by a commissioner was a nullity. The plaintiff, after taking depositions to prove the genuineness of the testimonio of a grant, which testimonio purported to have been issued on the

PRESUMPTION—*continued.*

15th of November, 1835, introduced on the trial the protocol of the grant or title of possession, issued by George W. Snyth, commissioner, with date as follows: "Given at the town of Nacogdoches, —, A. D. 1835." The protocol showed the date of the application and the order of survey to be September 15, 1835, and the date of the field-notes and of the order that title issue, to be November 11, 1835. The genuineness of the testimonio was questioned under oath, and both the protocol and a translation of the testimonio were in evidence: *Held*—

1. That the suspicion which might grow out of the irregularity of the protocol in its date alone should not prevent the operation of the presumption that the commissioner who issued it acted in all respects in conformity to law.

2. In the absence of any evidence of the date of a grant issued in 1835, the law would presume that the commissioner acted in the extension of title at a time when he might legally do so; and that the true date was prior to the closing of the land office, in the absence of evidence sufficient to overcome such presumption; and after the lapse of thirty-five years the evidence required to rebut the presumption must be full and satisfactory.

3. In favor of innocent purchasers, the presumption of the regularity and validity of a grant will be so strengthened, by acquiescence and the lapse of the time, as to stand until rebutted by satisfactory evidence.

4. But this presumption could not prevail to validate a grant without date except "—, 1835," if the genuine testimonio of the grant showed that the title was extended after the close of the land office in 1835, unless it was shown by evidence that the testimonio was issued on a day subsequent to making the protocol.

5. The making of the protocol and the issuance of the testimonio were ordinarily contemporaneous acts.

6. The statement of facts failed to show that what purported to be the original Spanish testimonio was ever read to the jury, but did show that what purported to be a translation thereof was read without objection, and that the Spanish document was attached as an exhibit to a deposition which was read, and in which it was referred to, and also that it was exhibited to a witness on the stand during his examination. The party who objected on appeal to the Spanish original being regarded in evidence, had himself asked an instruction on the trial, based on the hypothesis that the paper had been read: *Held*, That under these circumstances the original Spanish testimonio must be regarded as having been in evidence.

7. The testimonio is a second original, and may be resorted to for the purpose of supplying the defects of the protocol.

PRESUMPTION—continued.

8. The testimonio being in evidence, bearing a specific date showing the issuance of title after November 13, 1835, it was the duty of the court to submit to the jury a charge based on the hypothesis of its genuineness. *Blythe v. Houston*, 65.
2. The name of the wife being found on a promissory note conjointly with that of her husband, does not raise a legal presumption that she is, either jointly or severally, liable on it. *Harris v. Finberg*, 79.
3. From the fact that a survey in Mercer's colony bore date May 8, 1846, it will not be presumed in favor of a colonist claim that the survey was void, or not upon a valid file made on the land before the law of 25th June, 1845, protecting from general location lands in Mercer's colony. *Austin v. Dungan*, 236.
4. An administration was granted in May, 1840, the record showing no extension of time and no action therein until 1851: *Held*, that the presumption of law is that it was closed. *Marks v. Hill*, 345.
5. A B, who sued as a *feme sole*, in trespass to try title, alleged that she was the owner, and entitled to possession of the land sued for, and that she held the same by regular chain of title, which she filed; one of the deeds was made to her whilst her former husband was yet living. The court refused to charge that the presumption was, that the land was community property, and that the plaintiff could not maintain a suit for it in her own name: *Held*—
 1. That there was no error in refusing the charge.
 2. Distinguished from *Hatchett v. Conner*, 30 Tex., 111; *Holloway v. Holloway*, 30 Tex., 164; *Owen v. Tankersley*, 12 Tex., 413; and *Moffatt v. Sydnor*, 13 Tex., 628. *Hutchins v. Bacon*, 408.

PRINCIPAL AND AGENT.

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| <p>AGENT, 1, 2.</p> <p>DAMAGES, 10.</p> | <p>RAILWAY COMPANY, 4.</p> <p>REVOCATION.</p> |
|---|---|
1. If an agent, who makes the affidavit and bond in an attachment proceeding, acts maliciously in doing it, he is responsible; but his malice will not be imputed by presumption to his principal, though his wrong judgment in suing out the writ would be. *Wallace v. Finberg*, 37.
 2. The power to collect a note, given for the payment of the purchase-money of land, may be inferred from the authority to sell the land and take the note in payment for it. *Rodgers v. Bass*, 506.
 3. In the absence of special instructions to an agent to collect in gold or silver currency, a payment to the agent, in bank-bills, or other currency generally taken and used in the payment of debts, and current in business transactions as money, would satisfy the debt. *Id.*
 4. The legal inference from the authority of an agent to collect a

PRINCIPAL AND AGENT—*continued.*

debt is, that he is authorized to receive money, current and at par with coin, usually received, in like transactions, by the community in general where the debt is paid. *Id.*

5. Such agent has no authority to sell, or barter, or exchange the note to the debtor, or to any one else, for drafts, bills of exchange, or real property. *Id.*

6. Unless the language of the power to collect is qualified or restricted, it should be held as authority to authorize the receipt of currency and bills recognized, in general circulation, as money, rather than to such gold and silver coin, or notes and bills, as are, by the Constitution and laws, declared a legal tender. *Id.*

7. Tested by these rules, in February, 1862, Confederate States treasury notes, in Texas, must be held to have been current tokens or bills, used and passing, in business transactions, as money; and, ordinarily, an agent, to collect, could receive such notes in payment, unless forbidden by his principal. *Id.*

PRINCIPAL AND SURETY.

EVIDENCE, 1.

PRACTICE, 3.

PUBLIC OFFICER, 1.

PRIVY EXAMINATION.

AUTHENTICATION.

PROBATE MATTERS.

FOREIGN ADMINISTRATOR, 4.

JURISDICTION, 5, 6, 9, 10, 11.

STALE DEMAND.

1. The probate act of 1848 did not confer on Probate Courts the right to allow the widow to select property of the estate for a year's allowance, which had not been made at the passage of the law. *Marks v. Hill*, 345.

2. Probate Courts have no power to dispose of property of an estate, except as it is conferred by the statutes. *Id.*

3. An order was made by the Probate Court in 1851, in an administration originally granted May, 1840, and there was no evidence of its extension; personal property was set aside at its appraised value to the widow for a year's allowance for her support and that of her minor children: *Held*, Not merely irregular, but null and void. *Id.*

4. The acts forbidding the grant of administration upon the estates of deceased soldiers, create exceptions to the general power and jurisdiction of the Probate Courts. To have the benefit of the exception, the facts relied on, as avoiding the jurisdiction, should be clearly established, the presumption being in favor of the jurisdiction. *Vogelsang v. Dougherty*, 466.

5. The exception provided in said acts against the grant of admin-

PROBATE MATTERS—*continued*.

istration in estates of deceased soldiers, did not include citizens of Texas; and it was error to instruct the jury that said acts were applicable alike to all volunteer soldiers, whether citizens or from a foreign country. *Id.*

PROMISSORY NOTES.

DESCRIPTION, 3.

LIEN, 9.

MARRIED WOMAN, 5.

MECHANICS' LIEN, 5.

WAIVER, 2.

1. If the wife join her husband in the execution of a note for goods purchased for the wife, to replenish a stock of goods that were the separate property of the wife, such purchase would not be for the benefit of the wife's separate property, in contemplation of the statute, so as to make her liable on the note. *Wallace v. Finberg*, 35.

2. The assignee of a note secured by lien, may enforce the lien, as well as the payee, for the lien is an incident that follows the note. *Cannon v. McDaniel*, 304.

3. The legal owner of a promissory note may collect, and the maker cannot resist an action by such holder, on the ground that some other is the equitable owner. *Rodgers v. Bass*, 506.

4. Hence, when such legal owner has received payment in scope of his general authority, the equitable owner cannot maintain suit, and recover again, from the maker. *Id.*

PROTOCOL.

GRANT, 1.

PUBLICATION, SERVICE BY.

SERVICE BY PUBLICATION, 1.

SUIT BY PUBLICATION, 1.

PUBLIC OFFICERS.

EVIDENCE, 1.

OFFICER, 1.

PRACTICE, 3.

PRINCIPAL AND SURETY, 1.

1. In a suit by the State against an officer on his official bond, the cause of action survives against the securities on the death of their principal, and upon the suggestion of the principal's death the cause may proceed against the securities without alleging or proving the insolvency of the principal. *Boggs v. The State*, 10.

2. The power given to an officer, to formally state certain facts, which, when stated by him as prescribed, become the evidence of the liability of another person, is a public trust that must be executed by the person, and in the mode prescribed by the law delegating the authority. *Leon Co. v. Houston*, 575.

PUBLIC STREETS.

ACTION, 1, 2.

PURCHASER.

FORECLOSURE, 2, 3, 5, 6, 8, 9.

JUDGMENT, 10.

MORTGAGE, 1, 2.

PARTIES, 2, 3, 4, 10.

TRESPASS TO TRY TITLE, 8.

VENDOR AND VENDEE.

1. As against a purchaser, of whose claim there is notice, a sale had under a decree of foreclosure against the original vendee alone, is not sufficient to pass title. *Carter v. Attoaway*, 108.

2. Nor is it different where such purchaser knew, at his purchase, that the purchase-money, in whole or in part, was unpaid, and knew of the proceedings to enforce the lien. *Id.*

3. The pleadings not admitting that the defendant held by purchase prior to the commencement of the suit to foreclose, it was not error to admit the decree and sale made under it, when offered as evidence of title. *Id.*

4. Where such purchaser, under decree of foreclosure, brought trespass to try title against a prior purchaser, the equities which the plaintiff had as against the land, by his owning the judgment, by virtue of his purchase of the land and payment of the judgment, cannot be litigated. By proper pleadings, the plaintiff can enforce his equities against the land. *Id.*

5. It has been settled, by a long train of decisions, that where the vendor retains in his deed a lien for the purchase-money, he has the superior right to the land against the vendee, and those in privity with him, as long as the purchase-money remains unpaid; until the land is paid for, the vendee, and those claiming in his right as against the vendor, have merely an equitable and not the legal title to the land. *Peters v. Clements*, 114.

6. Subsequent purchasers are bound by the recitals in the deeds through which they claim, and are held to have had notice of whatever equities are apparent in the line of their title. *Id.*

7. Proceedings by suit, judgment, and sale to enforce the vendors' lien against the vendee, do not conclude the rights of a purchaser who had a deed and was in possession at the institution of the suit. *Id.*

8. Ordinarily, the possession of cotton by a cotton factor, who is a factor only, not engaged in buying and selling on his own account, raises a presumption that the cotton does not belong to him, but is held on commission for another; but this presumption may be rebutted by the real owner permitting his ownership to be concealed, and the property to be so acquired, managed, and possessed, by the factor, as to indicate to third persons that the factor is the real owner. Under such circumstances, the factor, so held out as the real owner, may sell the property, in discharge of his previous debt, to one who had no notice, actual or constructive, of the defects in his title, and the sale will be valid. *Morris v. Sellers*, 391.

9. The fact that land was bought at sheriff's sale, for or by a co-defendant in the execution, cannot affect the right to it, provided the creditor had a fixed lien upon the land, by levy or otherwise. *Grimes v. Hobson*, 416.

PURCHASER—*continued.*

10. Such purchase in no way diminishes his liability on the judgment, either in favor of the plaintiff in execution, or of the defendant, whose land was sold, if he paid more than his share of the judgment. *Id.*

RAILWAY COMPANY.

CONSTRUCTION, 5, 6.

NEGLIGENCE, 6, 7.

CONTRACT, 2, 3.

PARTIES, 7, 8, 9.

1. In a suit against a railroad company for the alleged wrongful act of its conductor in ejecting plaintiff from a passenger car, the jury was in effect charged, that in considering the actual damage sustained by plaintiff, they would estimate the same by the injuries sustained by the plaintiff in his feelings, his person, and his estate; that they might look to plaintiff's situation in life, his reputation in the community, and any circumstances which might appear from the evidence to have attended the act complained of, but they could not take into account the wealth of defendant or the poverty of the plaintiff: *Held*, That there was no error. *Hays v. H. G. N. R. R. Co.*, 272.

2. A corporation, as well as an individual, may be guilty of such "willful act, omission, or gross neglect," as to subject it to exemplary damages, but no more than individuals are they responsible for the malicious acts of their agents. No distinction can be made as to liability for damages inflicted by an agent, whether the master be a natural or an artificial person. *Id.*

3. The actual damage to which a railroad company must respond, extending, as it does, to injuries to the feelings, and damage for personal suffering, gives to juries sufficient scope, without allowing exemplary damages, except in cases when the corporation has itself been remiss. *Id.*

4. If the malicious act of its agent is ratified and adopted by a railroad company; if there is carelessness in the selection of employes, or in the establishment of appropriate regulations; if, in short, the corporation or other officers by whom it is controlled and represented are guilty of some "fraud, malice, gross negligence or oppression,"—the law will hold the company liable to exemplary damages, but not otherwise. *Id.*

5. The Texas and Pacific Railway Company was liable for damages caused by the Southern Pacific Railway Company prior to the 21st of March, 1872, the date when the consolidation of said companies was effected in pursuance of legislative enactments. *T. & P. R. W. Co. v. Murphy*, 356.

6. In a suit for damages against a railway company on account of the alleged negligence of its agents, it is not necessary that the petition should negative, either by facts stated or by direct averment, the existence of contributive negligence on the part of plaintiff; an exception to this rule exists when the petition, from its

RAILWAY COMPANY—*continued*.

averments, would establish, if unexplained, a *prima facie* case of negligence of the party injured. *Id.*

7. When by statute a specific duty is imposed on a railway company in regard to the running and management of its train, a breach of such duty by which one receives personal injury, may be declared in a charge of the court as matter of law to be wrongful or negligent. *Id.*

RECEIPT.

A receipt for a crib of corn, being exhibited as evidence against the maker of it, with parol evidence of its dimensions and a calculation of its capacity, does not preclude the bailee from showing by parol the actual contents of the crib: and *Held*, Error to exclude such testimony. *Masterson v. Goodlett*, 402.

RECITALS.

NOTICE, 2.

RECONVENTION.

ATTACHMENT, 2, 6.

PLEADING, 1.

REGISTRATION.

1. The entry upon the records of deeds of an instrument not legally authenticated for record, has no effect as notice. *Peters v. Clements*, 114.

2. *Grace v. Wade & Mains*, 35 Tex., 522, approved, holding that an unrecorded deed is void against a creditor who has acquired a specific lien or interest in the land in controversy by the levy of an execution under a judgment in a different county from that in which the land was situated, although the judgment has not been recorded in the county; and the creditor, or any one else who might purchase the land under the execution, would get title against the unrecorded deed, notwithstanding he might have full notice of the deed at the time of the purchase, provided the creditor had no notice prior to the levy of his execution. *Grimes v. Hobson*, 416.

RELEASE.

1. It is competent for a city council, when a charter authorizes a railroad company to build the road "under such conditions and ordinances as the mayor and aldermen of said city may provide and require," to release the railroad company from an obligation "to construct and keep in good repair all cross-culverts, whenever the same may be required under the rail-tracks." *Galveston v. G. C. R. R. Co.*, 435.

2. Both parties having acted upon an ordinance, is sufficient reason for its support. *Id.*

REMEDY.

The Legislature may change, modify, or otherwise regulate the remedy, provided a substantial remedy is left for the assertion of a right. There is no vested right in a particular remedy. *Treasurer v. Wygall*, 447.

REMOVAL OF CAUSE TO UNITED STATES COURT.

1. The filing of an application, in due form, for the removal of a cause from a State court to a Circuit Court of the United States, which contains a good cause for removal, under the laws of the United States, when the same is filed by one authorized by law to make the application, and the filing of the bond required in such case, have the effect to suspend instantly the jurisdiction of the State court. *Durham v. Southern L. I. Co.*, 182.

2. Under act of Congress of March 3, 1875, a party desiring to avail himself of the privilege of removing his cause to the United States courts is required to file his petition for such removal before the trial has begun: *Held*, That an application filed after the cause was called for trial, and the plaintiff had announced ready, and time had been granted the defendant to present an application for continuance, came too late, and was properly disregarded by the court. *Watt v. White*, 338.

3. The failure to present an application for such removal for several courts after the case is at issue, is a waiver of the right to such change, the application not having been presented "on or before the term at which the said cause could be first tried." *Id.*

REPLEVY.

No recovery can be had, on motion, against an officer who levies an attachment, for failure to take a sufficient replevy bond. *Cooper v. Harris*, 189.

RETROACTIVE LAWS.

STATUTES CONSTRUED, 10.

REVOCATION.

A power of attorney to sell land, the home of a single man, is revoked by his marriage. *Henderson v. Ford*, 628.

RULE FOR COSTS.

1. The letter of the statute (Paschal's Dig., 1500) authorizes the dismissal of the case when a rule has been regularly entered requiring the plaintiff to give security for costs, if the security is not given on or before the first day of the next term after the rule. By a liberal construction of the statute, it is held that the rule may be complied with after the first day, if done before the case is dismissed. *Cook v. Ross*, 263.

2. It is not error, for which, on appeal, a reversal will be had, to

RULE FOR COSTS—continued.

refuse to postpone a case when reached, in which a rule for costs has been entered, for the purpose of enabling the plaintiff to comply with the rule, or to overrule a motion to reinstate such case after the order of dismissal. *Id.*

SALE.

1. As against a purchaser, of whose claim there is notice, a sale, had under a decree of foreclosure against the original vendee alone, is not sufficient to pass title. *Carter v. Attoaway*, 108.

2. Where an injunction issued restraining the sale of land under a claim established by the defendant in the injunction suit, and a sale was ordered upon making a bond to secure the plaintiff in the injunction suit, and, under such order, sale was made: *Held*, Error, in subsequent proceedings, to hold the sale a nullity in favor of the plaintiff in the injunction suit, on his successful establishment of his superior right to the security of the lien upon the land so sold. *Watt v. White*, 338.

SEAL.

The fact that a sequestration bond does not require a seal must be regarded as finally settled. *Tompkins v. Toland*, 585.

SECONDARY EVIDENCE.**EVIDENCE.**

Secondary evidence of the contents of a paper addressed to a deceased person: *Held*, Admissible after its former existence, its genuineness and loss have been testified to by the executor, and an affidavit had been filed by the attorney of the plaintiff desiring the evidence, that the plaintiff and himself had made diligent search for the paper among the papers of plaintiff, where said paper ought to be, and that it had not been found, but was lost or mislaid. *Hutchins v. Bacon*, 409.

SEPARATE ACKNOWLEDGMENT.

AUTHENTICATION, 1.

MARRIED WOMAN, 6.

FRAUD, 2.

NOTICE, 3.

SEPARATE PROPERTY.

1. If the wife join her husband in the execution of a note for goods purchased for the wife, to replenish a stock of goods that were the separate property of the wife, such purchase would not be for the benefit of the wife's separate property in contemplation of the statute, so as to make her liable on the note. *Wallace v. Finberg*, 35.

2. Where, at a sale enforcing the vendor's lien in favor of the husband, the land was bid off by the agent of the husband, and the sheriff's deed made to the wife by the direction of the husband,

SEPARATE PROPERTY—*continued*.

the amount of the bid being credited on the judgment, in a suit brought by the wife, joined by her husband, on such title,—the court will regard the proceedings as vesting title in the wife as separate property. *Peters v. Clements*, 114.

SEQUESTRATION.

DAMAGES, 19, 20.

PRACTICE, 23.

SEAL.

1. It is error to admit evidence of damage resulting from the depreciation in the market price of goods seized under writ of sequestration, in the absence of any allegation in the pleadings that such special damage had been sustained; being an uncertain and not necessarily a natural or legal consequence of the seizure and detention, such damage must be specially pleaded. *Harris v. Finberg*, 80.

2. The fact that a plaintiff, who has caused goods to be seized under a writ of sequestration, has established his debt, and the validity of a written lien, by which he was authorized to take possession of and sell the mortgaged goods in the event his debt was not paid, does not preclude the defendant from showing that the suing out of the writ was wrongful, by negating, on the trial, the truth of the grounds on which it was issued; but it is incumbent on the defendant to make out by evidence a *prima facie* case that the suing out of the writ was wrongful, before the plaintiff can be required to disprove it. *Id.*

3. Where the suing out and levy of a writ of sequestration is malicious, exemplary damages may be awarded; where it is merely wrongful, without malice, actual damages only can be allowed; but in no case can the value of the defendant's time, while attending court, or any such incidental expense, be allowed as a proper element of actual damage. The establishment of any other rule would open a wide door for the admission of other expenses and losses incidental to the prosecution of rights in courts of justice, and would inaugurate a radical departure from the principles of the common law. *Id.*

4. A suit may be maintained in the District Court for damages for the wrongful and malicious levy of a writ of sequestration, when the amount claimed exceeds the jurisdiction of the magistrate; and this, though the judgment of the magistrate ordering that the property seized should be sold, stands in full force and not appealed from. *Rountree v. Walker*, 200.

5. In a suit for damages claimed for the wrongful and malicious suing out and levying a writ of sequestration, the plaintiff should plead and show what affidavit was made by the defendant to obtain the writ, and negative the truth of it. If no such affidavit was made, that fact should be stated, and that the writ was issued at the instance of the defendant. *Id.*

SEQUESTRATION—*continued*.

6. No recovery can be had against an officer for malicious use of process, who, when directed by a magistrate, levies a writ of sequestration on property, unless it is alleged and proved that he conspired with or instigated the plaintiff in the malicious issuing and levy of the writ. *Id.*

SEQUESTRATION BOND.

SEAL, 1.

SERVICE.

SUIT BY PUBLICATION, 1.

WRIT OF ERROR, 4.

SERVICE BY PUBLICATION.

SUIT BY PUBLICATION, 1.

Since the "act of March 15, 1875, prescribing the mode of service in certain cases," the affidavit of the person making such publication is required in addition to the return of the sheriff showing that the publication had been made. *Hewitt v. Thomas*, 232.

SERVICE OF CITATION.

CITATION, 1.

JUDGMENT BY DEFAULT, 1.

1. A sheriff's return to a citation, failing to show the date of service, the record not showing when the citation was filed, is defective; presumptions in favor of returns will not be extended beyond former decisions, and the provisions of the statute must be complied with. *Sloan v. Batte*, 215.

2. A party accepting service of the petition, and waiving process, does not thereby waive his right to defend the action. *Kennedy v. McCoy*, 220.

3. Where service of citation was waived and the petition was not filed by the first day of the term, it was error to take judgment by default at such term. *Id.*

SET OFF.

1. In a suit by a surviving partner on an obligation for a debt belonging to the partnership, but in his own name, the defendant can set off a partnership claim held by him. By the rule that "the debts must be mutual between the parties," is meant the real, and not merely the nominal, plaintiff and defendant. *Masterson v. Goodlett*, 402.

2. This is the rule, without reference to the solvency or insolvency of the members composing the firm. *Id.*

3. The authorities go further, and hold that if the demand sued on was the individual property of the survivor of the firm, the defendant would have the right to set off a partnership debt held by him against the firm. *Id.*

SETTLER.

1. If, at the time of a location upon land on which a settler's claim is made, such settler was not so occupying the land as to give him, under the statute approved August 12, 1870, the right to purchase under its provisions, the fact that a patent was afterwards obtained by such settler will not affect the rights of the locator. *Burleson v. Durham*, 152.

2. The word "settler," when applied to lands, conveys the idea of permanent inhabitancy. The settler, protected by the pre-emption laws, was one who actually resided on the land settled. *Id.*

3. Under said statute, the "settler," "actual settler," "*bona fide* settler," on whom is conferred the privilege of purchasing land of the State, is described in terms similar to those used in the pre-emption laws previously existing; and the statute intends to give such right of purchasing to him only who occupies public land as a residence or with a view to residence. *Id.*

4. The actual settler must reside on the land, or occupy it, preparatory to and with the *bona fide* intention of residing thereon. Occupancy for such purpose may be occupancy in good faith; occupancy for other purposes, does not entitle the party to purchase as an actual settler. *Id.*

SHERIFF'S RETURN.

CITATION, 1.

JUDGMENT BY DEFAULT, 1.

A sheriff's return to a citation, failing to show the date of service, the record not showing when the citation was filed, is defective; presumptions in favor of returns will not be extended beyond former decisions, and the provisions of the statute must be complied with. *Sloan v. Batte*, 215.

SHERIFF—SHERIFF'S SALE.

VOID AND VOIDABLE, 2.

1. The liability of a sheriff and his sureties to pay ten per cent. per month on the amount collected by him under execution, and which he fails, after demand, to pay over to the party entitled to receive it, can be enforced in any other way than by motion. *Scoggins v. Perry*, 111.

2. It may be questioned whether a party can, at his mere option, and without excuse for delay, allow several terms of courts to pass and then claim the heavily accumulated penalty of ten per cent. per month from the date of such failure. *Id.*

3. In a suit instituted in the ordinary way, by petition, against the sheriff and his sureties, for money by him collected, and which, after demand, he had failed to pay over, and for ten per cent. per month damages: *Held*, The suit being brought twenty months after the collection, that a party claiming the benefit of a penal statute must bring himself strictly within its provisions, and a demurrer to so much of the petition as claimed the penalty of ten per cent. per month was properly sustained. *Id.*

STALE DEMAND.

DIVIDING LINE, 1, 2.

When the general jurisdiction, assumed by the Probate Court, to grant letters of administration, is attempted to be collaterally impeached, thirty-one years after its assumption, and more than twenty years after one of plaintiffs came to Texas to look after the estate, by proving facts, avoiding the jurisdiction, (as that the deceased was a soldier, &c.,) and when the lands have, subsequent to sale under such administration, been bought and sold by innocent parties, and in which time, part has a second time passed through the Probate Court, it seems, that, even had the proof of the facts alleged been clear, the claim of the heirs, attacking such administration, should be held a stale demand. *Vogelsang v. Dougherty*, 466.

STATEMENT OF FACTS.

ADMISSIONS, 1.

EVIDENCE, 12.

Where a statement of facts, filed in case of appeal, is not signed by counsel, but is properly signed by the presiding judge, it will be presumed that it was made in that form because of the disagreement of counsel; and when the statement of facts is only certified to by the judge, as containing "all the evidence material in the case," the statutory meaning of the certificate is not thereby changed by such qualifying words. *Darcy v. Turner*, 30.

STATE POLICE.

AUTHENTICATION, 2.

STATE TREASURER.

ESTATES OF DECEDENTS, 15.

The following propositions are maintained as the individual opinion of the Chief Justice:

1. A judgment cannot be rendered against the State treasurer, in his official capacity, on the suit of one claiming as an heir for uncollected assets placed in his hand under the statute. The statute only authorizes such a suit for the money when collected. *Treasurer v. Wygall*, 448.

2. The comptroller, in drawing a warrant, and the treasurer, in paying, must do it under and in accordance with the terms of a law authorizing it; and there is no law authorizing the treasurer to pay out or deliver uncollected assets of an estate; but, on the contrary, there is a law directing him to collect them, and when collected as money, he can pay the same out, on a judgment rendered against him, under the statute authorizing suit against him for the money. *Id.*

3. The State treasurer, as such, cannot be bound by the judgment of a court, for that which he can find no authority to do by

STATE TREASURER—*continued*.

the law relating to and regulating his duties as an officer of the Government. He does not hold property of an estate deposited with him under the law in trust, to be delivered to any person who may establish by a judgment his beneficial interest in it, but in trust to be held until he can part with it according to the terms of some law, which authorizes or directs him. This is in accordance with his duties as State treasurer, in which capacity he is possessed of the assets, and not as an individual depository of trust property, who can be compelled, by the judgment of a court of equity, to deliver it to one who has recovered a judgment for it. *Id.*

4. A suit cannot be maintained against the State treasurer, as such, for uncollected assets of an estate, which he has no authority under the law, to deliver. *Id.*

5. The key that unlocks the State treasury, is an act of the Legislature, directing a thing to be done, which may be demanded; and not the judgment of a court, founded on equitable considerations, reaching beyond and changing the terms of the law in the disposition of property. *Id.*

STATUTE OF FRAUDS.

A parol sale of a fixture by the owner of the land, would be void under the statute of frauds. *Hutchins v. Masterson*, 551.

STATUTES CONSTRUED.

ADMINISTRATION, 6.	ESTATES OF DECEASED SOLDIERS.
AFFIRMANCE ON CERTIFICATE, 1.	ESTATES OF DECEDENTS, 10, 14.
AUTHENTICATION, 2.	JURISDICTION, 5.
BANKS, 1.	LEVY, 1.
CONSTRUCTION OF STATUTES.	LIMITATIONS, 1.
CORPORATIONS, 1, 2, 3.	PRACTICE IN DISTRICT COURT, 8.
COSTS, 4.	PRACTICE IN SUPREME COURT, 13.
COUNTY COURT, 1, 2.	RULE FOR COSTS, 4.
DAMAGES, 17.	TAXATION, 1, 2, 3.
DEBTOR AND CREDITOR.	TRESPASS TO TRY TITLE, 4.
	TRIAL BY JURY, 2.

1. Act of June 12, 1873, 13 Leg., 204, 205. *Harrison v. Vines*, 15.

2. The statute of August 26, 1857, (Paschal's Dig., 4647-49,) seems to have been intended as a privilege, and not as a limitation, upon the rights of the surviving husband. If he fails to avail himself of it, he may be held to a stricter accountability than that imposed by the statute, in the settlement with those jointly interested with him in the property. *Lumpkin v. Murrell*, 52.

3. Under "An act providing for the condemnation and sale of land for delinquent taxes," (Paschal's Dig., art. 7775,) the sheriff, on receiving from the comptroller the delinquent list for his county,

STATUTES CONSTRUED—*continued.*

and finding no personal property belonging to a delinquent tax payer, is required to certify such fact to the district clerk when filing the list with him; and the failure of the sheriff so to certify that he finds no personal property will be fatal to subsequent proceedings under said statute. *Belden v. The State*, 103.

4. The damages provided for in article 3781, Paschal's Dig., against sheriffs, can only be enforced by motion. *Scogins v. Perry*, 111.

5. The act of March 15, 1875, entitled "An act prescribing the mode of service in certain cases," is general in its provisions regarding the mode of making service on non-resident defendants, and applies as well to service of writs of error as to ordinary suits. The person making service and affidavit under the provisions of that act will be presumed to have been a "competent person," in the absence of anything to the contrary. *Simmons v. Fisher*, 127.

6. Sections 3 and 4 of "An act to regulate the disposal of the public lands of the State of Texas," approved August 12, 1870, discussed and construed. *Burleson v. Durham*, 152.

7. Section 6, article X, of the Constitution of 1869, construed. *Id.*

8. Section 10, article V, of the Constitution of 1876, in regard to trials by jury, was not practically put in operation until the adoption of the act of August, 1876, regulating juries; there was no error in impaneling a jury, without requiring the jury fee to be first paid, at the request of a party, between the date of that act and the third Tuesday in April, 1876, when the Constitution became the organic law of the State. *Castleman v. Sherry*, 229.

9. Since the "act of March 15, 1875, prescribing the mode of service in certain cases," the affidavit of the person making such publication is required in addition to the return of the sheriff showing that the publication had been made. *Hewitt v. Thomas*, 232.

10. The probate act of 1848 did not confer on Probate Courts the right to allow the widow to select property of the estate for a year's allowance, which had not been made at the passage of the law. *Marks v. Hill*, 345.

11. In October, 1876, an order was made by the district judge in Kaufman county, to transfer a cause which the presiding judge was disqualified from trying, to the county of Van Zandt. The district clerk of Kaufman county refused to make out a transcript of the entries and decrees in the case, and to forward them, together with the original papers in the cause, to Van Zandt county, as required by the order. On appeal by the plaintiff from the judgment of the District Court, refusing to award a *mandamus* against the clerk to compel a transfer of the papers in the cause: *Held*—

1. That the disqualification of the district judge is not, under the present Constitution, a cause for a change of venue.

2. When a district judge is disqualified, a special judge must be provided, as required by the act of 1876. (General Laws, sec. 3, p. 141.)

STATUTES CONSTRUED—*continued.*

3. The act of 1854, which provided for a change of venue when a district judge was disqualified, cannot be upheld as a law now in force by sec. 45, art. 3, of the Constitution of 1876, which provides that "the power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law, and the Legislature shall pass laws for that purpose;" that section, as well as that part of section 56 in the same article, which prohibits a special law changing the venue in civil or criminal cases, is designed as a limitation on the legislative power, and to require that a change of venue shall be a judicial act under a general law prescribed for that purpose.

4. That the writ of *mandamus* was properly refused. *Murray v. Broughton*, 351.

12. Article 1464, Paschal's Dig., is mandatory and peremptory. It leaves no discretion to the judge as to whether or not he shall "charge or comment on the weight of evidence," or as to whether or not he shall "submit questions of fact solely to the jury;" but in his charge, questions of law must be separated from questions of fact, and the latter be decided by the jury alone. The statute presumes that the jury is as competent to decide questions of fact as the judge is to determine questions of law. *T. & P. R. W. Co. v. Murphy*, 356.

13. In May, 1871, the Legislature passed an act providing for the change of venue, from Fort Bend county to Travis county, of a case against the State treasurer, involving the ownership of assets turned over to the treasurer, under the laws relating to the administration of the estates of deceased persons. The administration was closed in Wharton county, where the suit was begun, which was afterwards removed, by change of venue, under pre-existing law, to Fort Bend county, in April, 1871: *Held*—

1. That the suit, being against the State treasurer in his official, and not in his individual capacity, was in effect a suit against the State, which had been permitted under a statute applicable to it; and that the Legislature had power to protect the interests of the State, by requiring the particular suit, and all others of like character, to be removed to the District Court, at the State capital, in Travis county, where the interest of the State could be more conveniently protected.

2. Though the exercise of a legislative power, thus to provide for a change of venue after suit brought, might be used oppressively, the lack of such a power might result in the perpetration of the most flagrant injustice.

3. Where the State has, under her laws, assumed a trust in the custody of an estate not claimed by heirs, and the general rules prescribed for the administration of the trust in any particular case are inadequate, the State, by its Legislature, has

STATUTES CONSTRUED—*continued.*

power, commensurate with its assumed duties and responsibilities, to make the remedy complete, by special law, if necessary, for the protection of the just rights of others, or the security of its own in the trust property.

4. Property of an estate thus turned over to the State treasurer by an administrator, occupies the same position as property that has been escheated to the State; and in either case, it may be sued for under the permission of the laws.

5. In such a suit the State is substantially a party, and can be sued only on its own terms, whether prescribed generally or specially; the Legislature is not limited in prescribing the terms, unless some constitutional limitation of its power exists, prohibiting it from passing the particular law for the protection of the State.

6. The act of 1870, relating to the estates of deceased persons, being prospective in its operation, though it did not authorize a suit against the State treasurer to recover assets turned over to him, when the heirs were unknown, as was done by the act of 1848, yet it did not have the effect to abate a suit properly brought for such a purpose before the act of 1870 was passed. The right to bring such a suit, once having been conferred, could not, after the institution of the suit under the act of 1848, be taken away, without the violation of a vested right in the heirs or distributees. *Treasurer v. Wygall*, 447.

14. Act of May 18, 1838, Hart. Dig., 984; act of December 24, 1838, Hart. Dig., 989; act of January 14, 1841, Hart. Dig., 1503, Paschal's Dig., 1400. *Vogelsang v. Dougherty*, 467.

STOCK.

1. A subscription of stock in an incorporated company, or in anticipation of a company, is usually in the shape of a mutual agreement, written and signed by those desiring to be corporators, or of a mutual undertaking in writing to be bound to take a share or shares in an incorporation already created, in which the nature, object, and terms of the association are to some extent indicated. The company becomes a party to the contract resulting from this mutual agreement, either expressly or by implication, from the terms of the subscription. *Galveston Hotel Co. v. Bolton*, 633.

2. The Galveston Hotel Company was incorporated under a charter, which fixed the capital stock at two hundred and fifty thousand dollars, with power to increase it to one million; which provided that ten per cent. of the amount subscribed should be deposited with the treasurer at the time of subscription, and that the company should be organized whenever fifty thousand dollars of stock should be subscribed for. Suit was brought against Bolton as a subscriber for stock in the company on a subscription, in the following form, viz :

STOCK—continued.

"Subscription to Galveston Hotel Co.

"C. L. Bolton, 5 shares..... \$2,500 "

The original paper was not shown to have been in the hands of the company or its officers, but was lost, and Bolton's name was not found on the books of the company as a corporator or subscriber for stock; he never paid anything on the alleged subscription, and never participated in any action of the company, but acknowledged verbally to the secretary his obligation to pay, and asked indulgence: *Held*—

1. The fact that no percentage was ever paid on the alleged subscription was admissible in evidence, as tending to show that whatever was done was an incomplete transaction, and not a consummated act of subscription.

2. From the fact that the charter allowed the company to be organized when shares to the amount of \$50,000 had been taken, it does not follow that it could then enter fully on the performance of the enterprise for which it was chartered. Such a construction would render nugatory the provision of the charter which fixed the capital stock at \$250,000.

3. The whole capital stock must have been taken before a call for payment could be lawfully made on a subscriber.

4. When there is no provision in the charter of a corporation to the contrary, he who takes the first share of stock takes it on condition, that all of the shares will be taken until the amount fixed as the capital stock of the company shall be taken, by persons who will be equally bound with himself to bear the expense of the enterprise, share and share alike.

5. *Quere*, whether, when the charter requires a subscription to be accompanied with the payment of a percentage of the share of stock subscribed, its payment is necessary to make the subscription valid?

6. *Quere*, whether, when the charter itself gives a remedy, by a sale of the shares of stock in default of payment of an assessment, an action can be maintained by the company against a defaulting subscriber. *Id.*

STREETS.

DAMAGES, 12, 13, 14, 15, 16.

SUBROGATION.

ESTOPPEL, 1.

VENDOR AND VENDEE, 7,
14, 15.

PARTIES, 3.

B purchased land from C, from whom he received a deed, and to whom he gave three notes, with D and E as sureties for the purchase-money, and executed a mortgage to secure the same; afterwards C assigned to X two of the notes only, and, in conjunction with his wife, guaranteed their payment; X held the notes so as-

SUBROGATION—*continued.*

signed for the use of Y, and, as his trustee, had the same allowed, after B's death, by his administrator, and approved by the County Court; afterwards, X, for the use of Y, recovered a judgment against D and E, the sureties, and C and his wife, as guarantors, having alleged the insolvency of B's estate. In entering the judgment, the clerk failed to show that it was for the use of Y. X failed to collect the judgment. In a suit afterwards brought by Y to correct the judgment, so as to show his interest, and as subrogated to the rights of C and wife, to recover judgment against B's administrator foreclosing the mortgage: *Held*—

1. That B did not, by his purchase, acquire a legal title to the land, but it remained in C, who, as to the notes assigned by him, held it in trust for the benefit of Y.

2. That as C had not only assigned two of the notes, but had guaranteed their payment, there being no other fund except the proceeds of the sale of the mortgaged land, Y was entitled to priority of payment over the note not assigned.

3. That the case, as stated, presents equities which the County Court had no power to adjudicate.

4. That Y, being subrogated to the rights of C, would not lose his claim upon the land, though the remedy on the notes had been lost.

5. That the judgment in the suit by Y, to correct the judgment procured by X, should have been for the principal and interest due on the notes, subjecting the land to sale for its satisfaction, with an order directing its execution by the administrator in the administration of the estate. *Cannon v. McDaniel*, 304.

SUBSCRIPTION.

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SUBSCRIPTION—*continued*.

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SUIT BY PUBLICATION.

When by amendment an allegation is made of such a nature that the defendant should be served with notice, and such service was had by publication, there being no appearance, the proceedings will be considered as if in a “suit by publication,” and unless the record contain a statement of facts, such judgment will be reversed. *Hewitt v. Thomas*, 232.

SURETY.

- EVIDENCE, 1.
- PRACTICE, 3, 23, 24.
- PUBLIC OFFICERS, 1.

SURVEY.

1. From the fact that a survey in Mercer's colony bore date May 8, 1846, it will not be presumed in favor of a colonist claim that the survey was void, or not upon a valid file made on the land before the law of 25th June, 1845, protecting from general location lands in Mercer's colony. *Austin v. Dungan*, 236.

2. A survey in Mercer's colony being in conflict with an older survey, patent thereon was refused on the field-notes; subsequently, a resurvey was made of that part of the land not in conflict, on which patent was issued, the original field-notes not being found in the land office, and the register of their return showing an erasure of the original number of acres and the reduced number inserted instead: *Held*, That the resurvey was a presumptive relinquishment of that part not included in the resurvey. *Id.*

3. A subsequent appropriation by the original claimant should be initiated by a file or location in the county surveyor's office, and not by indicating a claim to it in the land office upon the original field-notes and surveys abandoned. *Id.*

4. Where it is shown that a tract of land sued for forms part of a block of surveys, the outer corners of the surveys in the block being known and identified, and from adjacent surveys the position of the land sued for is thus ascertained and fixed, such evidence of identity of the land sued for is sufficient, though no lines or corners can be found of the survey in controversy. *Jones v. Burgett*, 285.

5. Where from actual corners, lines not marked are run by course and distance, and a stream is found where called for, but of a different name from that called for in the field-notes, it may be inferred that the call for the stream was a mistake, and to that extent course and distance would be regarded, instead of the call for a stream elsewhere made in the field-notes. *Id.*

6. There is no rule of law which makes a call for a natural object, under all circumstances, the controlling call, so as to preclude the consideration of other evidence as to the true locality of the land. *Id.*

7. The fact that lines of a survey were not actually run, will not invalidate a patent, provided the land can be identified with reasonable certainty; and where lines were not run, a mistake in a call for a river might occur, which, if made in a survey actually run, would be difficult to explain. *Id.*

8. That a surveyor adopted field-notes of a former survey, which were incorrect, however evidencing dereliction of duty in the surveyor, would not affect the validity of a patent upon such defective survey. *Id.*

9. By the evidence in the trial below, it was a question open to

SURVEY—continued.

controversy as to whether the survey relied on by plaintiff commenced at the point designated in the deed from H. to V., and in this state of the evidence the court charged as follows: "Before the plaintiff can recover under this branch of the case, he must satisfy you that the land embraced in the deed from H. to V. is the same land, or some portion of the same land described in the petition." * * And again: "In ascertaining whether the land conveyed by H. to V. is the same land described in the petition, the jury should look to all the facts and circumstances detailed in the evidence. All that is required of the plaintiff is to show with reasonable certainty that the land conveyed from H. to V. is the same land, or some portion of the same land, sued for and described in the petition:" *Held*, That, unexplained and unqualified, this charge, taken literally, entitled the plaintiff to recover all, on his showing title to any part of the land sued for, and was erroneous. *Bell v. Vanzant*, 300.

TAXATION.**TAX COLLECTOR.****TAXES.**

1. It is well settled that shares of banking associations authorized by the act of Congress of June 3, 1864, "To provide a national currency," in the hands of the shareholders, are liable to taxation by the States, within the limitations set forth in said act, although the capital of such bank is invested in national securities declared by said act as "exempt from taxation by or under State authority." *Harrison v. Vines*, 15.

2. The act of June 3, 1873, (13 Leg., 204, 205,) requires the assessment for taxation of "any shares or stock in any banking company or corporation." The word "share" and "stock" are used as synonymous, and each corporator is required to give in for taxation the part or portion of the capital or capital stock of the corporation, or association, he owns. *Id.*

3. It is not necessary that it be embodied in the State law imposing such a tax, that it is not greater than that levied upon capital in the hands of individual citizens, or upon the shares of banks organized by the State laws. It is sufficient that such law in fact does not violate those provisions of the national currency act. *Id.*

TAX COLLECTOR.**OFFICER, 1.****TAXES, 1.**

A tax collector does not occupy toward the State the relation of a mere bailee for hire, who is responsible only for such care of the public money as a prudent man would take of his own; he is bound to account for and pay over the public money that he collects, less his commission, or his securities must pay it for him. *Boggs v. The State*, 10.

TAX DEED.

LIMITATION, 14.

When a tax deed gives what, on its face, appears to be a sufficient description of the land conveyed, and there is no evidence developing any latent uncertainty, the authorities do not decide that such a deed does not satisfy the statute of limitations. *Flanagan v. Bogges*, 331.

TAXES.

CORPORATIONS, 1, 2, 3.

TAXATION, 1, 2, 3.

OFFICER, 1.

TAX COLLECTOR, 1.

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2. It is not a sufficient ground for an injunction restraining the collection of a tax upon an assessment actually made, that it has not been correctly described on the assessment rolls, prepared from the assessment actually made. *Prima facie* the tax is due upon the assessment, and equity will not aid one who is himself in default. *Harrison v. Vines*, 15.

3. Under "An act providing for the condemnation and sale of land for delinquent taxes," (Paschal's Dig., art. 7775,) the sheriff, on receiving from the comptroller the delinquent list for his county, and finding no personal property belonging to a delinquent tax payer, is required to certify such fact to the district clerk when filing the list with him; and the failure of the sheriff so to certify that he finds no personal property will be fatal to subsequent proceedings under said statute. *Belden v. The State*, 103.

4. In a suit by tax payers of a county, to annul proceedings of the County Court authorizing the issuance of bonds of the county and to enjoin the collection of taxes to pay interest on such bonds, the bondholders are necessary parties. *Board v. T. & P. R. W. Co.*, 316.

5. This court is not prepared to hold that, to support the bar of five years' limitation, it was necessary to prove payment of taxes during the time the statute was suspended. *Flanagan v. Bogges*, 331.

TENANT—TENANCY IN COMMON.

When suit is brought to recover land allotted to plaintiff in partition, his right to recover against a defendant showing no title, will not be defeated by showing the invalidity of the proceedings under which the partition was made. *Truchart v. McMichael*, 222.

TENDER.

1. A tender of Confederate money will not affect the liability of

TENDER—continued.

the maker of a note, whether made to an agent or to the holder of the same. *Simpson v. Foster*, 618.

2. Nor will a non-resident owner of a promissory note be in any way liable for loss resulting to the maker of such note from the agent of the owner turning the note over to the Confederate States receiver, under the laws of the Confederate States during the war. *Id.*

TESTIMONIO.**GRANT.****PRESUMPTION, 1.**

The testimonio of a deed by public act executed in 1834, cannot be admitted to record without proof of its execution. *Hutchins v. Bacon*, 408.

TRANSCRIPT.

PRACTICE IN SUPREME COURT, 13, 14, 15, 16.

TRESPASS TO TRY TITLE.**LAND, 4, 5.****PRACTICE, 19.****PLEADING, 3.****TENANT AND TENANCY IN COMMON.**

1. When suit is brought to recover land allotted to plaintiff in partition, his right to recover against a defendant showing no title, will not be defeated by showing the invalidity of the proceedings under which the partition was made. *Truchart v. McMichael*, 222.

2. The defendants in trespass to try title pleaded that they were innocent purchasers, who had bought a portion of the land sued for, and had, in good faith, made permanent and valuable improvements thereon. Though there was evidence in support of the plea, the court, in the charge, failed to allude to the subject of improvements, though the jury, in returning a verdict for plaintiffs, added, "the present occupants to hold their improvements." The court in rendering judgment, treated this portion of the verdict as surplusage: *Held—*

1. That though no judgment could have been rendered on so much of the verdict as clearly intended to protect the defendants in the value of their improvements, it could not be disregarded, as surplusage.

2. If the pleadings had presented no issue of improvements in good faith, or if the evidence had justified the court in withdrawing the issue from the jury, the finding on the subject of improvements, might have been rejected.

3. The fact that a purchaser, who has paid for land, did so, with knowledge of an adverse claim, which was, in fact, the better title, is not conclusive of the fact that such purchaser had not acted in good faith.

4. That the verdict, being only a conditional finding for plaintiff, should not have been received. *Hutchins v. Bacon*, 408.

TRESPASS TO TRY TITLE—*continued.*

3. A B, who sued as a *feme sole*, in trespass to try title, alleged that she was the owner, and entitled to possession of the land sued for, and that she held the same by regular chain of title, which she filed; one of the deeds was made to her whilst her former husband was yet living. The court refused to charge that the presumption was, that the land was community property, and that the plaintiff could not maintain a suit for it in her own name: *Held*—

1. That there was no error in refusing the charge.

2. Distinguished from *Hatchett v. Connor*, 30 Tex., 111; *Holloway v. Holloway*, 30 Tex., 164; *Owen v. Tankersley*, 12 Tex., 413; and *Moffatt v. Sydnor*, 13 Tex., 628. *Id.*

4. An action involving title to land, (under *Dangerfield v. Paschal*, 20 Tex., 537,) is, in effect, an action of trespass to try title to the land, whatever be its form. *Grimes v. Hobson*, 416.

5. The plaintiff's right to bring a second suit in trespass to try title exists, whether the first suit was adjudicated on the verdict of a jury or on demurrer; the law is construed according to its spirit, in order to embrace a case that is wanting in one of the incidents mentioned in the statute, though embodying the substance of what the statute requires, and coming within the object evidently contemplated in its enactment. *Edgar v. Galveston City Co.*, 421.

6. See opinion, for facts stated in a petition which constitute a good cause of action in trespass to try title. *Id.*

7. In trespass to try title, the plaintiff claimed as purchaser at execution sale, under a judgment obtained by himself against the defendant. The defendant pleaded the want of actual notice of the proceeding under which the judgment was obtained, (which was rendered after service by publication;) that the claim sued on was fraudulent and unjust, (specifying in what,) and prayed that the judgment be vacated: *Held*, That the parties being the same in both proceedings, the averments of the answer were sufficient to support it as a bill of review, and if properly supported by evidence, to authorize the reopening of the judgment, and the setting aside the sale of the land. *Cundiff v. Teague*, 475.

8. A purchaser of land at a trust sale, made under a deed of trust, which was executed by one, the recorded deed to whom retained in terms a lien for the purchase-money notes, which were never paid, does not acquire such a right as will enable him to maintain trespass to try title against one, who is in possession for a valuable consideration, under the administrator of the original vendor. *Masterson v. Cohen*, 520.

TRIAL BY JURY.

AUDITOR, 1.

PRACTICE, 4.

STATUTES CONSTRUED, 8.

1. A party has a right to specially object to any item allowed by,

TRIAL BY JURY—*continued.*

or disallowed, or to any conclusion arrived at, by an auditor, as exhibited in his report, and have the verdict of a jury thereon in response to evidence adduced on the trial of the case. In the absence of such objections, it is not error for the court to charge, that the report of the auditor is conclusive, nor does such practice contravene the right of the party to a trial by jury. *Boggs v. The State*, 10.

2. Section 10, article V, of the Constitution of 1876, in regard to trials by jury, was not practically put in operation until the adoption of the act of August, 1876, regulating juries; there was no error in impaneling a jury, without requiring the jury fee to be first paid, at the request of a party, between the date of that act and the third Tuesday in April, 1876, when the Constitution became the organic law of the State. *Castleman v. Sherry*, 229.

3. In an equitable proceeding to set aside a judgment rendered in a proceeding at law, the practice of having two trials—one to determine whether the judgment shall be set aside, and the other to retry the original suit after the judgment rendered in it has been set aside—is not adapted to our mode of procedure, in which all the material facts must be submitted to a jury, when the same is demanded, whether the suit involves matters of law or equity. *Roller v. Wooldridge*, 485.

TRUST AND TRUSTEES.

COMMUNITY PROPERTY, 1.

PLEADING, 4.

1. There is no rule by which one can be held to have converted property to his own use and still hold it in trust for the owner. The owner may have the right to elect whether he will sue for tort or bring his bill for an account, but it would be inequitable for him to do both. *Lumpkin v. Murrell*, 51.

2. The court will take notice of the absence of money, other than Confederate bills or notes, during the Confederate war; and will not allow for rents, interest, hire, &c., against a trustee, without proof that they were actually received during that period, and by the trustee. *Id.*

3. It is a common and familiar application of "their remedial justice" for courts of equity to force upon the conscience of a party the duty of a trustee in regard to property which has been acquired by artifice or fraud, and where, either from the character of the property or the circumstances under which it is acquired or held, it would be against equity to permit such party to hold it except as trustee. *Hendrix v. Nunn*, 141.

4. The cases where such relief is granted are, generally, where there has been some breach of duty or want of good faith and fair dealing on the part of the person acquiring the property, or of him from whom or under whom he has obtained it, of which he has actual

TRUST AND TRUSTEES—*continued.*

or constructive notice; or, where the property has been acquired or possession of it taken on the assumption of a trust character, or under the belief by those with whom the transaction is had, or by reason of which it was acquired or possessed, that it was taken or acquired in trust; or, where it has been obtained by some undue influence. *Id.*

5. See this case for allegations held insufficient to charge defendant as such trustee. *Id.*

6. See facts held insufficient to authorize such relief against the defendant. *Id.*

7. One of several trustees, in whom is vested the power to sell, cannot execute a conveyance that will pass title to the trust estate. *Hart v. Rust*, 556.

8. Where two executors are appointed with power to administer an estate, without control of the Court of Probate, and both qualify, a deed by one for land of the estate, is inoperative. *Id.*

VARIANCE.

1. A petition, citation, and service on John R. Favers will not support a judgment by default against John R. Faver. *Faver v. Robinson*, 204.

2. Where a note is copied into the petition, or attached thereto as an exhibit, there can be no variance when the note is offered in evidence. *Spencer v. McCarty*, 213.

VENDITIONI EXPONAS.

1. That a *venditioni exponas* is a writ of execution, and confers upon the officer to whom it is directed authority to sell land upon which the writ of *feri facias* has been levied, cannot be regarded an open question in this court. *Borden v. McRae*, 396.

2. The same rule obtains where a levy has been made upon land in a different county from that where the judgment was rendered. *Id.*

3. The return of the execution exhibiting an unsatisfied levy, and thereby showing property of the defendant in *custodia legis* for the satisfaction of the judgment, not only authorizes, but requires, that proper process shall issue for its disposal. This process is the writ of *venditioni exponas*. *Id.*

4. It is not within the scope or authority of the writ of *venditioni exponas*, to subject to sale the property to which the general lien of the judgment attaches, but merely that to which a specific right or lien has been acquired by the levy of the *feri facias*. *Id.*

VENDOR AND VENDEE.

FORECLOSURE, 2, 3, 7, 8.

NOTICE, 4.

FRAUDULENT REPRESENTATIONS, 1.

PURCHASER.

NEW SECURITY, 1.

LAND, 2, 3.

TRESPASS TO TRY TITLE, 8.

LIEN, 17.

WAIVER, 5.

1. It is not competent in the District Court to order sale by the

VENDOR AND VENDEE—continued.

sheriff of lands of an estate against which the vendors' lien is enforced. The order should require the administrator to make sale. *Heath v. Garrett*, 23.

2. In a suit to enforce the vendors' lien, a subsequent vendee in possession, and claiming under a recorded deed, is a necessary party. *Carter v. Attoaway*, 108.

3. It has been settled, by a long train of decisions, that where the vendor retains in his deed a lien for the purchase-money, he has the superior right to the land against the vendee, and those in privity with him, as long as the purchase-money remains unpaid; until the land is paid for, the vendee, and those claiming in his right as against the vendor, have merely an equitable and not the legal title to the land. *Peters v. Clements*, 114.

4. Where the vendee is in default in the payment of the purchase-money, the vendor may sue for the land and recover it, unless the vendee makes good his equitable title by payment; or he may purchase his lien, and subject the land to sale for the payment of the purchase-money. *Id.*

5. Where the vendor forecloses his lien, and a third party becomes the purchaser, the vendor is estopped from controverting the title, or from taking advantage of any irregularities in the proceedings of foreclosure; and if necessary to the security of the purchaser, equity will subject him to the rights of the plaintiff or vendor. *Id.*

6. Where, at a sale enforcing the vendors' lien in favor of the husband, the land was bid off by the agent of the husband, and the sheriff's deed made to the wife by the direction of the husband, the amount of the bid being credited on the judgment, in a suit brought by the wife, joined by her husband, on such title,—the court will regard the proceedings as vesting title in the wife as separate property. *Id.*

7. In a suit against a purchaser from a vendee, of land on which the vendors' lien rested, and of which such purchaser is affected with notice, the defendant has the right to redeem, or to have the original vendee made a party, and others, who may be purchasers, and have their equities adjusted. *Id.*

8. In such suit, it was error to instruct the jury that both plaintiff who claimed under the purchase under decree enforcing the vendors' lien, and the defendant, holding by purchase of vendee before suit, held under the original vendee; and that defendant, not being party to the suit enforcing the lien, was on that account entitled to recover. *Id.*

9. A petition alleging the execution of a promissory note by the vendee and others, for the purchase-money of land, is sufficient to support a judgment enforcing the vendors' lien against such land. *Faver v. Robinson*, 204.

10. Where the vendor of land takes a distinct and independent security, either of property or of the responsibility of third persons,

VENDOR AND VENDEE—*continued.*

he will be considered to have waived the lien which equity infers from the sale on credit, unless it appears that he reposed as well upon the lien as upon such other security. *Id.*

11. Where the lien is claimed in addition to such other security, it must be alleged and proved that the lien was not waived by the taking of such other security. *Id.*

12. While the doctrine that a mortgage to secure the purchase money executed by the vendee at the time he receives his conveyance, has the effect to make the contract executory, is well settled by the decisions of this court, it is believed that its extension so as to give like rights to others than the vendors may lead to confusion; and such application of the principle should only be made where the right is clear. *Wright v. Wooters*, 381.

13. A purchaser at foreclosure sale (and particularly, if the plaintiff) has the right of action to foreclose against the subsequent purchaser; in which suit the subsequent purchaser would have the right to make any defense he has; to put in issue the execution of the mortgage; if other lands were included in the mortgage, he may have necessary parties made, and the question of amount, with which the tract of land is chargeable investigated, and have other lands, which were included in the mortgage, subjected to the debt, so that the tract purchased shall be subjected only to its proper proportionate amount. *Id.*

14. B sold land to C, reserving, in the deed made by him, a lien for the purchase-money, to be paid, as specified, in notes given therefor. The notes were never paid; B died, and C conveyed the land to K, who was B's administrator, receiving in payment his own notes, given to B, and making a deed to K: *Held*,

1. The conveyance from C to K, and the delivery to C of the notes for the purchase-money, conferred upon C no greater estate than he originally acquired by his deed, nor did it diminish the right of the estate, or of any one legally holding under it.

2. Though the notes were delivered up and canceled, the consideration of the deed to C, the payment of which could alone pass the legal title by virtue of said deed, was not, in fact, paid to the estate.

3. A sale under a deed of trust, executed by C, before his surrender of the notes, was not affected by said surrender, and the deed made by C to the administrator; but the purchaser at the trust sale, upon paying the original purchase-money due from C, would be entitled to recover the land. *Masterson v. Cohen*, 520.

15. Although the vendors' lien may be absolute, yet if a mortgage for the purchase-money be given back at the same time, the fee will substantially remain in the vendor. *Id.*

16. A purchaser of land at sheriff's sale, which was sold under a

VENDOR AND VENDEE—continued.

judgment for the purchase-money due to one of several joint vendors, on an executory contract for the sale of the land purchased, (the other joint vendors having been paid,) takes title to the whole property, as against one having notice, and claiming under a mortgage executed by the original vendee, and who was not a party to the proceedings in which judgment was rendered. *Turner v. Phelps*, 251.

17. One who has entered upon the vacant public domain, as a purchaser from another who assumed to have title, may, on discovering that the land is vacant, repudiate the executory contract for its purchase, without quitting possession, resist the payment of the notes given for the purchase-money, and while in possession, if entitled to pre-empt land, may take steps to secure it as a purchaser. *Rodgers v. Daily*, 578.

VENDOR—VENDORS' LIEN.

VENDOR AND VENDEE. 1, 2, 3, 5, 8, 10, 12, 14, 15, 16.

Proceedings by suit, judgment, and sale to enforce the vendors' lien against the vendee, do not conclude the right of a purchaser who had a deed and was in possession at the institution of the suit. *Peters v. Clements*, 115.

VENUE.

CHANGE OF VENUE.

VERDICT.

DAMAGES, 2, 3.

1. The court should not receive a verdict which fails to find material issues submitted in the charge. *Kerr v. Hutchins*, 385.

2. The defendants, in trespass to try title, pleaded that they were innocent purchasers, who had bought a portion of the land sued for, and had, in good faith, made permanent and valuable improvements thereon. Though there was evidence in support of the plea, the court, in the charge, failed to allude to the subject of improvements, though the jury, in returning a verdict for plaintiffs, added, "the present occupants to hold their improvements." The court in rendering judgment, treated this portion of the verdict as surplusage: *Held—*

1. That though no judgment could have been rendered on so much of the verdict as clearly intended to protect the defendants in the value of their improvements, it could not be disregarded as surplusage.

2. If the pleadings had presented no issue of improvements in good faith, or if the evidence had justified the court in withdrawing the issue from the jury, the finding on the subject of improvements might have been rejected.

3. The fact that a purchaser, who has paid for land, did so

VERDICT—*continued*.

with knowledge of an adverse claim, which was, in fact, the better title, is not conclusive of the fact that such purchaser had not acted in good faith.

4. That the verdict, being only a conditional finding for plaintiff, should not have been received. *Hutchins v. Bacon*, 408.

VESTED RIGHT.

ESTATES OF DECEDENTS, 5.

The Legislature may change, modify, or otherwise regulate the remedy, provided a substantial remedy is left for the assertion of a right. There is no vested right in a particular remedy. *Treasurer v. Wygall*, 447.

VOID AND VOIDABLE.

ESTATES OF DECEASED SOLDIERS. JUDGMENT, 4, 9, 10.

INJUNCTION, 2, 3.

SALE, 2.

1. An order was made by the Probate Court, in 1851, in an administration originally granted May, 1840, and there was no evidence of its extension; personal property was set aside at its appraised value to the widow for a year's allowance for her support and that of her minor children: *Held*, Not merely irregular, but null and void. *Marks v. Hill*, 346.

2. A sale of land made by sheriff, under writ of execution, after return-day of the writ, is void, and conveys no title to the purchaser. *Hester v. Duprey*, 625.

WAIVER.

PLEADING, 6, 7.

PRACTICE, 12.

SERVICE OF CITATION, 2.

1. Where the vendor of land takes a distinct and independent security, either of property or of the responsibility of third persons, he will be considered to have waived the lien which equity infers from the sale on credit, unless it appears that he reposed as well upon the lien as upon such other security. *Faver v. Robinson*, 204.

2. Where a note is secured by a mortgage, the lien is not lost by bringing suit first on the note without including the lien. *Cannon v. McDaniel*, 305.

3. Under act of Congress of March 3, 1875, a party desiring to avail himself of the privilege of removing his cause to the United States courts is required to file his petition for such removal before the trial has begun: *Held*. That an application filed after the cause was called for trial, and the plaintiff had announced ready, and time had been granted the defendant to present an application for continuance, came too late, and was properly disregarded by the court. *Watt v. White*, 338.

4. The failure to present an application for such removal for sev-

WAIVER—*continued.*

eral courts after the case is at issue, is a waiver of the right to such change, the application not having been presented "on or before the term at which the said cause could be first tried." *Id.*

5. In a suit by one claiming as the vendor, and also under a foreclosure and sale, and against one not a party to the foreclosure proceedings, having purchased prior to such suit, the question, whether the vendor was precluded from enforcing his "superior title" as against the assignee of the purchaser, the purchase-money not being paid, is material, and should be submitted to the jury if pleaded in defense. *Wright v. Wooters*, 380.

6. Taking a new note with security, for a note secured by mortgage, is not a waiver of the mortgage, unless expressly intended to have that effect. *Id.*

WILL.

FOREIGN ADMINISTRATOR. 2, 3.

B. died in 1862, leaving a will, in which he made his three children his executors and equal heirs. He gave, however, to his son D. a negro, in addition to his otherwise equal share, to compensate him for maintaining E. B., a deaf brother of the testator. In the next clause of the will, he expressed the wish that his son D. would take especial care of E. B. during the latter's life; and if his son D. should die before his brother E. B., he desired that his other two children, E. L. and M. D., should take charge of and provide for his brother, E. B., while he lived. The remaining clause of the will provided, "it is my wish that my homestead and five hundred and fifty-nine acres of land, with the improvements thereto attached, shall be set apart to my son D., extra of his interest in the remaining portion of my estate, in consideration of the landed interest already given to my other children, and as a compensation for maintaining of my brother E. B. as aforesaid." Suit was brought by E. B., for the rents and profits of the homestead, in which it was claimed that it was changed in the hands of the legatees with the support and maintenance of E. B., during his natural life: *Held*—

1. The will, properly construed, must be regarded as conveying the testator's desire for the maintenance and support of his brother E. B., as he had been previously provided for by the testator himself.

2. It was the intention, that E. B. should be provided for as a member of the family, without imposing a pecuniary burden on the heirs, in the shape of a charge or incumbrance on the estate, or of limiting the support of E. B. to any specific amount.

3. If E. B. left the homes of the heirs, provided for him in the will, without their fault, they would not become liable for an amount sufficient to support him elsewhere.

WILL—*continued*.

4. A judgment making an annual allowance of a stated sum of money for E. B. in the future, and giving him money for his estimated expenses in the past, while living away from the heirs, was erroneous. *Lynn v. Busby*, 600.

WITNESS.

The amount due each witness for attendance in a suit, should be separately taxed, and thus carried into the bill of costs accompanying the execution, so as to give the defendant each item of costs he is required to pay. *H. & G. N. R. R. Co. v. Jones*, 133.

WRIT OF ERROR.

1. A motion was made to dismiss a writ of error because the same was sued out more than two years after the date of the judgment. The petition in error alleged that one of the plaintiffs in error, who was a married woman, had continued a *feme covert* until the suing out of the writ, and that her co-defendant in the court below died before the date of the judgment, leaving two minor children, who remained minors until married, in less than two years before suing out the writ, which statements were not contested: *Held*, 1, That even had it been shown that those who were alleged to have been minors were not such, the petition in error could be maintained by the *feme covert* and her husband; the statute of limitation did not run against her during marriage; 2, that one of two or more defendants in a judgment may sue out a writ of error. *Simmons v. Fisher*, 126.

2. Though there is no statute expressly authorizing the widow and heirs, or an administrator of the estate of a party to a judgment, who dies, to sue out a writ of error, the right exists as resulting from the right of appeal, which is secured by law. In the absence of a statute prescribing an appropriate mode of obtaining a review of proceedings on appeal, it is competent for the court to supply the deficiency by adopting proper rules upon the subject. *Id.*

3. When the widow of one against whom judgment has been rendered in the District Court, refuses to join her children and heirs in applying for a writ of error, there is no impropriety in her being made a defendant by the heirs. *Id.*

4. The act of March 15, 1875, entitled "An act prescribing the mode of service in certain cases," is general in its provisions regarding the mode of making service on non-resident defendants, and applies as well to service of writs of error as to ordinary suits. The person making service and affidavit under the provisions of that act will be presumed to have been a "competent person," in the absence of anything to the contrary. *Id.*

WRIT OF ERROR BOND.

1. A citation in error was served, on the 18th day of Octo-

WRIT OF ERROR BOND—*continued.*

ber, 1876; the plaintiffs in error were adjudged bankrupts, on the 18th of January, 1877; the transcript not being filed, a judgment of affirmance was rendered, on certificate, on February 13, 1877, on motion of defendant in error, made January 30, 1877; the assignment of causes, to which the writ of error was returnable, began on the 29th of January, 1877; an assignee of bankruptcy of plaintiffs in error was appointed February 17, 1877. On the 16th of March, 1877, a motion was filed by the sureties of the plaintiffs in error on their error bond alone, to set aside the judgment of affirmance, upon the ground that their principals had been adjudged bankrupts after the citation in error had been served, and before the judgment of affirmance was rendered: *Held*—

1. In order to suspend the enforcement of a judgment in the District Court until it can be examined in the Supreme Court, the sureties upon the writ of error bond, in effect, under the statutes of Texas, make themselves parties, jointly with the plaintiff in error, and liable to a judgment against them, in conjunction with the plaintiff in error, for the amount that may be adjudged against him in the Supreme Court.

2. The writ of error bond, required by statutes, (Paschal's Dig., art. 1495,) has, by its terms, the force of a judgment against the sureties, and when, on it, a judgment is rendered, in the Supreme Court, against the sureties, it relates back and operates as a lien upon the land of all the obligors from the date of the bond, as any other judgment would, of that date.

3. The permission given the sureties, by statute, (Paschal's Dig., art. 4625,) to institute proceedings within one year from the forfeiture of the bond, for any cause that should defeat or modify a recovery on the bond, does not relate to a motion in the Supreme Court alone, but was designed to embrace any suit or proceeding that might be necessary.

4. That a person adjudged bankrupt is *civilitur mortuus*, is true, only in a qualified sense. Until an assignee is appointed to represent him, he may do whatever is necessary to protect his interest in a suit then pending.

5. Had the plaintiffs in error, or the sureties, filed a transcript of the record at the proper time, and, on a suggestion of bankruptcy made, shown that the plaintiffs in error had been adjudged bankrupts, the trial of the cause would have proceeded to judgment against the sureties, if no error was found in the record, and further proceedings would have been stayed against the bankrupts alone.

6. Bankruptcy confers a personal privilege; the suggestion of bankruptcy is one to be made by the bankrupt, and the bankrupts in this case, not having appeared and asked to set aside the judgment rendered as against them, no stay of proceedings against them will be ordered.

WRIT OF ERROR BOND—*continued*.

7. According to the laws of this State, a judgment was legally rendered against the plaintiffs in error, without violating any provision of the Federal bankrupt law; the rendition of said judgment works a forfeiture of the writ of error bond, and gives it the force and effect of a judgment against the sureties who filed the motion. *Hickcock v. Bell*, 610.

